apparently not reported in 145 US ?

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 193.

THE SPALDING LUMBER COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 9, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 31, 1891.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Michigan, northern division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the United States, plaintiff, and Spalding Lumber Company, defendant, a manifest error hath happened, to the great damage of the said Spalding Lumber Company, defendant, as by *his* complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

2 Witness the Honorable Samuel F. Miller, associate justice of the said Supreme Court, the twenty-third day of August, in the year of our Lord one thousand eight hundred and eighty-eight.

{ Seal of the U. S. Circuit Court, Western District of Mich., Northern Division. }

CHARLES S. FITCH, *Clerk*,
By F. M. MOORE,
Deputy Clerk of the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division.

Allowed by—
H. F. SEVERENS,
Dist. Judge.
Aug. 31st, 1888.

[Endorsed:] 170. The circuit court of the United States, western district of Michigan, northern division. Spalding Lumber Co., pl'ff in error, *vs.* United States, def't in error. Writ of error.

3 To the honorable the justices of the Supreme Court of the United States:

The execution of the within writ appears by the schedule hereto annexed, the answer of the judge of the circuit court of the United

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Michigan, northern division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the United States, plaintiff, and Spalding Lumber Company, defendant, a manifest error hath happened, to the great damage of the said Spalding Lumber Company, defendant, as by *his* complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

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3 To the honorable the justices of the Supreme Court of the United States:

The execution of the within writ appears by the schedule hereto annexed, the answer of the judge of the circuit court of the United

States for the northern division of the western district of Michigan.
Dated September 28th, 1888.

CHARLES S. FITCH, *Clerk*,
By F. M. MOORE, *Deputy*.

{ Seal of the U. S. Circuit Court, Western District of Mich., Northern Division. }

The Circuit Court of the United States for the Western District of Michigan, Northern Division.

4 THE UNITED STATES OF AMERICA
vs.
SPALDING LUMBER COMPANY.

To the clerk of said court:

Please to issue summons in the above-entitled cause in a plea of trespass on the case, to the damage of the plaintiff, $12,000, returnable Sept. 7th, 1886.

Dated August the 10th, 1886.

Yours truly,
J. W. STONE,
Plaintiff's Att'y & U. S. Att'y.

5 Circuit Court of the United States of America for the Sixth Circuit and Western District of Michigan, Northern Division.

The President of the United States of America, to the marshal of the western district of Michigan, Greeting:

You are hereby commanded that you summons Spalding [SEAL.] Lumber Company, if it shall be found in your district, to be and appear in the circuit court of the United States of America for the sixth circuit and western district of Michigan, northern division, to be held in the city of Marquette, in the said district, before the judges thereof, on the 7th day of September, A. D. 1886, then and there to answer unto the United States of America in a plea of trespass on the case, to the damage of the said plaintiff of $12,000; and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court this 11th day of August, in the year of our Lord one thousand eight hundred and eighty-six.

W. S. HILL, *Dep. Clerk.*
JOHN W. STONE,
Att'y for Pl'ff, U. S. Att'y.

Return.

WESTERN DISTRICT OF MICHIGAN, *Northern Division*, } *ss*:

I hereby certify and return that on the 24th day of August, A. D. 1886, I served the within writ on John Murphy, agent of the 6 Spalding Lumber Company, defendants within named, at Cedar Falls, in said district, by delivering a copy to John

Murphy, agent, and showing the original with the seal of the court thereon.

DANIEL TYRRELL,
U. S. Marshal.

Endorsed: Filed Sept. 8, A. D. 1886. W. S. Hill, dep'y clerk.

7 UNITED STATES OF AMERICA, *Western District of Michigan,* } ss:

Circuit Court of the United States for the Western District of Michigan, Northern Division.

The United States of America, plaintiff in this suit, by G. Chase Godwin, its attorney for said district, complains of the Spalding Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, said Spalding Lumber Company having been duly summoned to answer said plaintiff of a plea of trespass on the case.

For that whereas the said Spalding Lumber Company, defendant, was heretofore, to wit, on the first day of June, A. D. 1886, and ever since has been and still is a corporation organized and doing business under and by virtue of the laws of the State of Michigan, having its principal office and place of business at, to wit, the village of Escanaba, in the State of Michigan, and also doing business under said name at, to wit, Menominee, Escanaba, and other places within said northern division of said district, and for that whereas the said plaintiff heretofore, to wit, on the first day of June, A. D. 1886, at, to wit, Cedar Forks, in the county of Menominee, in the said northern division of said district, was lawfully possessed as of its own property of certain pine saw logs and chattels, to wit, five thousand pine saw logs and, to wit, one million feet of pine boards, said saw logs containing, to wit, one million feet of pine lumber, all of great value, to wit, of the value of $12,000; and, being so possessed thereof, the said plaintiff afterwards, to wit, on the first day of June,

8 A. D. 1886, at, to wit, Cedar Forks, in said northern division of said district, casually lost the said logs and lumber out of its possession, and the same afterwards, to wit, on the same day and year last aforesaid, came into the possession of said defendant by finding, yet the said defendant, well knowing the said logs and lumber to be the property of the said plaintiff and of right to belong to it, the said defendant has not as yet delivered the same or any part thereof to the said plaintiff, although often requested so to do, but hath hitherto wholly refused so to do; and afterwards, to wit, on the day and year last aforesaid, in the place last aforesaid, converted and disposed of the said logs and lumber to its own use, to the damage of said plaintiff in the sum of $12,000.

2nd count.

And also for that whereas the said plaintiff heretofore, to wit, on the first day of August, 1886, at, to wit, Cedar Forks, in the county of Menominee, in said northern division of the western district of

Michigan aforesaid, was lawfully possessed as of its own property of certain pine logs and lumber, to wit, one million feet, board measure, of pine logs and, to wit, one million feet of pine lumber, which said logs and lumber were cut from the following-described lands or some part thereof, to wit, those pieces and parcels of land situate in the county of Menominee and State of Michigan and described as the south one-half of the south one-half of section 12, in township 36 north, of range 26 west, and the southwest one-fourth of the southeast one-fourth and the southeast one-fourth of the southwest one-fourth and the south half of the northeast one-fourth and the north half of the southeast one-fourth of section 30, in town-
9 ship 37 north, of range 25 west, all of said logs and lumber then and there being of great value, to wit, of the value of $12,000, lawful money of the United States of America, and, being so possessed thereof, the said plaintiffs afterwards, to wit, on the said first day of August, A. D. 1886, at, to wit, said Cedar Forks, in the county of Menominee and in the northern division of said district aforesaid, casually lost the said logs & lumber out of its possession, and the same afterwards, to wit, on the day & year last aforesaid, to wit, at, to wit, Cedar Forks, in the county of Menominee, in said northern division of said western district of Michigan aforesaid, came to the possession of said defendant by finding, yet the said defendant, well knowing the said lumber and logs to be the property of the said plaintiff and of right belonging and appertaining to it, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the said plaintiff in this behalf, hath not as yet delivered the said logs and lumber or any part thereof to the said plaintiff, although often requested so to do, and hath hitherto wholly refused so to do, and afterwards, to wit, on the first day of August, A. D. 1886, and, to wit, at said Cedar Forks, in said northern division of said district aforesaid, converted and disposed of said lumber and logs to its own use; and for that also whereas on, to wit, the 10th day of August, A. D. 1886, at, to wit, Cedar Forks, in the county of Menominee, in said northern division of the western district of Michigan, was lawfully possessed as of its own property of one million feet, board measure, of pine lumber, which said pine lumber had been cut at a saw-mill at said Cedar Forks, which said pine lumber was of great value, to wit, of the value of $12,000, and, being so possessed on the 10th day of August, A. D. 1886, at the place last aforesaid, was casually lost by plaintiff and on the same day came to the possession of the said de-
10 fendant by finding, and the said defendant, well knowing the same to be the property of plaintiff and contriving and intending to defraud the said plaintiff in this behalf, hath not as yet delivered the said logs and lumber to plaintiff, although often requested so to do, but hath hitherto wholly refused so to do, and on said day and year last aforesaid and at the place last aforesaid said defendant converted and disposed of the said logs and lumber to its own use, all to the damage of plaintiff of $12,000, and therefore the said plaintiff brings this suit.

G. CHASE GODWIN,
U. S. Att'y for Western Dist. of Michigan, Attorney for Plaintiff.

(Endorsed:) Filed Oct. 16, 1886. W. S. Hill, dep. clerk.

11 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Western District of Michigan, Northern Division.

UNITED STATES OF AMERICA
vs.
SPALDING LUMBER COMPANY.

Now comes the said defendant, by F. O. Clark, its attorney, and demands a trial of the matters set forth in the plaintiff's declaration filed in this cause.

F. O. CLARK,
Att'y for Def't.

(Endorsed:) Filed Oct. 18, 1886. W. S. Hill, dep. clerk.

12 At an adjourned session of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, continued and held at the United States court-rooms, at the city of Marquette, on Thursday, the second day of August, A. D. one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

Present: Hon. Howell E. Jackson, U. S. circuit judge; also Hon. Henry F. Severens, U. S. district judge.

UNITED STATES
vs.
SPALDING LUMBER COMPANY.

The parties in this cause being in court, by their respective attorneys, by stipulation of parties in open court, the following description of land mentioned in plaintiff's declaration: the south half of the south half of section 12, township 36 N., range 26, was stricken out, and the parties being now ready for trial, thereupon came a jury, to wit, Andrew J. Cook, Chris. Olson, Francis G. Dodge, Martin Winberg, Thomes Bates, William Kehl, Alonzo Worthing, Edward Erickson, Benjamin T. Brailey, Justin N. Mead, John C. Hodgson, and Phillip Morgan, good and lawful men, who, being duly empaneled, tried, and sworn well and truly to try the issue between the parties, sat together and heard the evidence this day adduced; whereupon the court adjourned until to-morrow morning, at 9 o'clock.

13 UNITED STATES OF AMERICA:

Adjourned May Term, A. D. 1888.

FRIDAY, *August* 3, 1888.

Court met pursuant to adjournment.

Present: Hon. Howell E. Jackson, U. S. circuit judge, and Hon. Henry F. Severens, U. S. district judge.

UNITED STATES
vs.
SPALDING LUMBER COMPANY.

The jury heretofore duly empaneled, tried, and sworn in this cause sat together and heard the conclusion of the evidence, the arguments of counsel, and the charge of the court, and retired from the bar thereof in charge of George H. Houser, an officer of the court, duly sworn for that purpose, to consider of their verdict to be given, and after being absent for a time returned into court and say upon their oaths that the said defendant is guilty of the premises in the said plaintiff's declaration laid to its charge in manner and form as the said plaintiff hath in its said declaration complained against it, and they assess the damages of the said plaintiff by reason thereof, over and above its costs and charges by it about its suit in this behalf expended, at the sum of $4,823.84.

14 UNITED STATES OF AMERICA.

Adjourned May Term, A. D. 1888.

TUESDAY, *August* 7, 1888.

Present: Hon. Henry F. Severens, United States district judge.

UNITED STATES
vs.
THE SPALDING LUMBER COMPANY.

The jury by whom the issue joined in this cause was tried having rendered a verdict therein in favor of the plaintiff and against the defendant, and having assessed the damages of the said plaintiff on occasion of the premises at the sum of $4,823.84, over and above its costs and charges by it about its suit in this behalf expended:

Therefore it is considered that the said plaintiff do recover against the said defendant its damages aforesaid, in form aforesaid assessed, together with its costs and charges aforesaid, to be taxed, and that the said plaintiff have execution therefor; and, on motion of F. O. Clark, attorney for defendant, ordered that the execution in this cause be stayed for sixty days that a writ of error may be procured to the Supreme Court and bond filed that will operate as a supersedeas.

15 *Bond.*

Supreme Court of the United States.

THE UNITED STATES
vs.
SPALDING LUMBER COMPANY.

Know all men by these presents that we, Spalding Lumber Company, of Menominee county, Michigan, and Ambrose Campbell, of Marquette, Marquette county, Michigan, are held and firmly bound unto the United States of America in the sum of ten thousand dol-

lars, to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 24th day of August, A. D. 1888.

Whereas the above-named Spalding Lumber Company has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the sixth circuit and western district of Michigan, northern division:

Now, therefore, the condition of this obligation is such that if the above-named Spalding Lumber Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

SPALDING LUMBER COM.
JESSE SPALDING, *Pres.* [SEAL.]
AMBROSE CAMPBELL. [SEAL.]

Sealed and delivered in presence of—

—— ——.

16 UNITED STATES OF AMERICA, } ss:
Western District of Michigan, Northern Division, }

— Ambrose Campbell, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of ten thousand dollars over and above his just debts and liabilities.

—— ——.

Sworn to before me this 24th day of August, A. D. 1888.
F. M. MOORE,
U. S. Commissioner.

I approve the above bond and the sufficiency of the sureties thereto.
Aug. 31, 1888.
H. F. SEVERENS,
Dist. Judge.

(Endorsed:) Filed Sept. 3, 1888. F. M. Moore, dep. clerk.

17 *Citation.*

THE UNITED STATES OF AMERICA:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1888, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Michigan and northern division

thereof, wherein Spalding Lumber Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry F. Severens, district judge, presiding in the circuit court, this 31st day of August, in the year of our Lord one thousand eight hundred and eighty-eight.

HENRY F. SEVERENS,
District Judge.

(Endorsed:) Filed Sept. 3, 1888. F. M. Moore, dep. clerk.

18 STATE OF MICHIGAN, } ss:
County of Marquette, }

F. O. Clark, being duly sworn, deposes and says that on the 3rd day of September, A. D. 1888, he served a notice of the issuing of the writ of error in the cause within mentioned upon Hon. G. Chase Godwin, U. S. district attorney, by serving the within notice upon him by mailing to said Godwin, at Grand Rapids, Michigan, the place of residence of said Godwin, a duplicate copy of said notice, together with a copy of the citation issued in said cause, a copy of which is hereto annexed, by placing a copy of said notice and of said citation in an envelope plainly addressed "Hon. G. Chase Godwin, district attorney, Grand Rapids, Mich.," and depositing the said envelope in the U. S. post office at Marquette, Michigan, with the full legal postage thereon prepaid, said Grand Rapids being the place where the business office of said Godwin is located.

F. O. CLARK.

Sworn to and subscribed before me this 10th day of September, A. D. 1888.

F. M. MORRE,
Notary Public. [SEAL.]

(Endorsed:) Filed Sept. 10, '88. F. M. Moore, dep. clerk.

19 Supreme Court of the United States.

SPALDING LUMBER COMPANY, Appellant & Pl'ff in Error,
vs.
THE UNITED STATES, Def't in Error.

Take notice that a writ of error was issued out of said court in the above-entitled cause the 23rd day of August, 1888, returnable the second Monday in October next; that a bond was given for a supersedeas the 24th day of August, A. D. 1888, and duly approved by Hon. Henry F. Severens, district judge; that upon the 31st day of August, 1888, a citation was issued by said judge, directed to the United States, a copy of which is hereto annexed; that said writ of error, citation, and bond were filed with the clerk of the circuit court of the United States for the sixth circuit and northern divis-

ion of the western district of Michigan, and that a copy of said writ and citation have been left with said clerk for the defendant.

Dated September 3rd, 1888.

F. O. CLARK,
Att'y for Pl'ff in Error.

To Hon. G. Chase Godwin, U. S. dist. att'y, att'y for def't in error.

[Endorsed:] Filed September 3, 1888.

20 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Michigan, northern division, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between The United States, plaintiff, and Spalding Lumber Company, defendant, a manifest error has happened, to the great damage of The Spalding Lumber Company, defendant, as by *his* complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, associate justice of the [SEAL.] said Supreme Court, the 23rd day of August, in the year of our Lord one thousand eight hundred and eighty-eight.

CHARLES L. FITCH, *Clerk,*
By F. M. MOORE,
Deputy Clerk of the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division.

21 Allowed by—
H. F. SEVERENS,
Dist. Judge.

Aug. 31, 1888.

22 (Copy.)

THE UNITED STATES OF AMERICA:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the second Monday of October, A. D. 1888, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Michigan and northern division thereof, wherein Spalding Lumber Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice, should not be done to the parties in that behalf.

Witness the Hon. Henry F. Severens, district judge, presiding in the circuit court, this 31st day of August, in the year of our Lord one thousand eight hundred and eighty-eight.

HENRY F. SEVERENS,
District Judge.

On the back of said copies of writ of error, citation, and notice, which were attached together, appears the following:

Copies of writ of error, citation, and notice of issuing writ filed for defendant. F. O. Clark, attorney for plaintiff in error. Filed Sept. 3, 1888.

23 *Assignments of Error.*

Copy.

UNITED STATES OF AMERICA:

The Supreme Court, of the October Term in the Year of our Lord one thousand eight hundred and eighty-eight.

SPALDING LUMBER COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error. } In Error.

Afterwards, to wit, on the second Monday of October in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Spalding Lumber Company, by F. O. Clark, its attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1. Because the United States circuit court for the sixth circuit and western district of Michigan, northern division, erred in receiving in evidence testimony offered by the defendant in error, and that under objection of attorney for plaintiff in error for the purpose of showing that the pre-emption entries made by one Reagan and one Prell were not made in good faith, and that they did not in fact settle upon and improve and cultivate the land covered by such entries, as required by law, and proof of like character, which proof was offered for the purpose of impeaching the pre-emption certificates of the register and receiver, which certificates showed that they had made proof of their settlement and cultivation according to law to the satisfaction of the register and receiver and had paid their money and received said certificates as evidence of their title.

24 2. Because the said circuit court admitted proof as to the good faith of the said pre-emptors Reagan and Prell in the making of their settlement and cultivation and also proof for the purpose of showing that the United States Commissioner of the General Land Office had cancelled said pre-emption certificates.

3. Because the said circuit court allowed said proof as to good faith, settlement, and cultivation and the cancellation of said pre-emption entries by the United States Commissioner of the General Land Office, it appearing that the plaintiff in error was a purchaser in good faith and without notice that there was any fraud in the said pre-emption entries, or that the certificates had been held for cancellation.

4. Because notwithstanding the circuit and district judges were divided in opinion, first, as to whether it was competent for the Commissioner of the General Land Office under the circumstances hereinbefore stated (meaning the facts appearing in the certificate of division of opinion) to cancel the entries and certificates aforesaid ;

Second. Whether such a cancellation would prevent a valid purchase from a certificate holder of the timber on the land by a purchaser having no notice thereof:

Yet the said circuit court directed the jury to render a verdict against the plaintiff in error for $4,823.84.

5. Because the circuit court instructed the jury to find a verdict for the plaintiff, being the defendant in error, which verdict
25 was accordingly rendered, and because the said court directed judgment to be entered upon said verdict of $4,823.84, with the costs of the action taxed upon the same.

And the said Spalding Lumber Company prays that the judgment aforesaid may be reversed and altogether held for nothing, and that it may be restored to all things which it has lost by occasion of the said judgment, etc.

F. O. CLARK,
Attorney for Plaintiff in Error.

(Endorsed:) Filed Sept. 22, '88. F. M. Moore, dep. clerk.
26 [Endorsed:] U. St. of America. Supreme Court. Spalding Lumber Co., pl'ff in error, *vs.* United States, def't in error. Assignment- of error.

27 Take notice that the annexed is a true copy of the assignments of error in said cause this day filed with the clerk of the circuit court for transmission with the record to the said Supreme Court.

Dated Sept. 22, 1888.

F. O. CLARK,
Att'y for Pl'ff in Error.

To G. Chase Godwin, Esq., U. S. district att'y, att'y for def't in error.

STATE OF MICHIGAN, } ss:
Marquette County, }

B. O. Pearl, being duly sworn, deposes and says that upon the 22nd day of September, A. D. 1888, he served a true copy of the within assignments of error upon G. Chase Godwin, attorney for defendant in error, by placing the same in an envelope, plainly addressed G. Chase Godwin, Grand Rapids, Michigan, the place where said attorney resides and has his office for business, and depositing the same in the post office at Marquette, Michigan, the legal postage thereon being prepaid.

B. O. PEARL.

Subscribed and sworn to before me this 22nd day of September, A. D. 1888.

RICHARD BLAKE,
Notary Public in and for said County.

Endorsed: Filed Sept. 22, '88. F. M. Moore, dep. clerk.
28 [Endorsed:] U. S. of America. Supreme Court. Spalding Lumber Co., pl'ff in error, *vs.* United States, def'ts in error. Proof of service of assignments of error.

29 *Certificate of Division.*

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division.

THE UNITED STATES
vs.
SPALDING LUMBER COMPANY.

At a session of said court, held at Marquette on the 3rd day of August, A. D. 1888, this cause came on for trial before a jury, duly empanelled for that purpose, Hon. Howell E. Jackson, circuit judge, and Hon. Henry E. Severens, district judge, being present.

The action was in trover brought to recover the value of a quantity of pine alleged to have been the property of the United States and to have been cut and taken from certain lands in Michigan, described as the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter, the south half of the northeast quarter and the north half of the southeast quarter, of section thirty, in town. 37 north, of range 25 west.

It was admitted on behalf of the parties that on the 20th day of October, 1882, John Reagan filed his declaratory statement for preemption entry of the first two of the above descriptions with the register and receiver of the land office at Marquette, that
30 being the proper office, and that on the same day George A. Prell filed his declaratory statement for the like entry for the last two of said descriptions with the same officer.

It was also admitted that on Dec. 11th, 1883, the said Reagan and Prell respectively appeared with their witnesses before the register and receiver of the said land office, and there made final proof to the satisfaction of those officers of the settlement, improvement, and cultivation by them respectively of the lands included in their declaratory statements aforesaid, and each made the oath required by the statute on such final proof in respect to the land claimed by them severally; and, at the same time, they each paid into the office aforesaid the price of the said lands, the said Reagan the sum of $200 and the said Prell the sum of $400, and each received *their* certificate of purchase for the lands so purchased by them.

It was further admitted that on the 23rd day of November, 1885, the said Reagan, for the price of $600, sold to said Prell, by an instrument duly acknowledged and recorded in the office of the register of deeds of the proper county, all the pine timber standing on the land so pre-empted by him, and that on the 27th day of the same month the said Prell sold to the defendant in this suit all the pine timber standing on the lands so pre-empted by Reagan and himself for the sum of $6.50 per thousand feet, delivered on the bank of a stream in the neighborhood.

It was also admitted that the defendant received and paid
31 for under this contract 651,095 feet of the timber on said land, and that the same was worth the contract price, viz., $6.50 per thousand, and that the defendant appropriated it to its own use.

This was the conversion sued for.

And thereupon the district attorney proposed and offered evidence for the purpose of proving that the said Reagan and Prell respectively did not enter the said lands in good faith, and did not in fact settle upon, improve, and cultivate the said land in such a manner as required by law, but that on the contrary this residence on the land was casual only, and the cultivation and improvement were of trifling extent and character, and that the pre-emptors were residents of Wisconsin and never became residents of this State; that on November 17th, 1885, the Commissioner of the General Land Office, by letter addressed to the register and receiver, ordered that both of said pre-emption entries be held for cancellation for want of proper settlement, improvement, and cultivation, and ordered that the pre-emptors be allowed sixty days in which to appeal to the Secretary of the Interior.

It was shown in this connection that the said Reagan and Prell appealed within the sixty days to the Secretary of the Interior, but that no direction or order was made by the Secretary thereon until September 19th, 1887, when, by letter from the Commissioner of the Land Office to the register and receiver at Marquette, they were directed to consult with one Hursley, a timber agent in that locality,
as to the time when a hearing should be had before them, and
32 that the pre-emptors aforesaid should be notified thereof, and that they should show cause why the said decision of the Commissioner aforesaid should not be affirmed. No notice of this letter and order was ever given to the pre-emptors, and no time for hearing was ever fixed. It also appeared that the defendant had

not notice of the order for cancellation of the entries by the Commissioner above mentioned until after the timber sued for had been received, and that on getting such notice they directed that no more be taken.

Whereupon the following questions of law arose for determination by the court:

1st. Whether it was competent for the Commissioner of the General Land Office under the circumstances hereinbefore stated to cancel the entries and certificates aforesaid.

2nd. Whether such cancellation would prevent a valid purchase from a certificate holder of the timber on the lands by a purchaser having no notice thereof.

Upon each of which said questions the said circuit and district judges were divided in opinion.

And thereupon, in accordance with the opinion of the circuit judge, the proof so offered was received and evidence was given upon the question (which was controverted by the defendant) whether the residence, settlement, cultivation, and improvement by the preemptors were such as to warrant the issuance of the certificates; and proof was made of the cancellation of the certificates by the Commissioner in the manner above stated.

33 It was also shown that an agent and the secretary of the defendant prior to the date of the final proof by the preemptors made and filed with the register and receiver of the Marquette land office affidavits of facts being within their knowledge or information negativing the right to make the entries, and again in a few days after the certificates were made and in the same month filed similar affidavits with the Commissioner of the Land Office.

The court instructed the jury to find a verdict for the plaintiff, which was done accordingly, in the sum of $4,823.84, and a judgment was entered thereon in favor of the plaintiff for that sum with cost of the action.

And upon request of counsel for the defendant the foregoing questions upon which the judges were divided in opinion as aforesaid are certified to the Supreme Court of the United States for its decision and answer, to the end that due proceedings be here further taken in the action.

Dated August 10, A. D. 1888.

HOWELL E. JACKSON,
Circuit Judge.
H. F. SEVERENS,
District Judge.

34 [Endorsed:] U. S. court. United States *vs.* Spalding Lumber Co. Certificate of division of opinion.

35 *Opinions of the Judges.*

Judge JACKSON:

GENTLEMEN: Upon consideration of the question that was argued on yesterday the court will, for the present, admit this evidence, and

if it becomes necessary we will give you a certificate of division on the question whether there is any supervisory control on the part of the Land Commissioner or the Secretary of the Interior over the action of the register and receiver.

The authorities are divided on that question. My brother, the district judge, upon a presentation of the question at a former term of this court, when a portion of the authorities on the question were cited, reached the conclusion that the register and receiver in accepting the entry, proof being made to his satisfaction of the fact of settlement and improvement by the pre-emptor, that in accepting the entry under such circumstances and receiving payment, acted judicially, and that his action could not be reviewed by the department and was conclusive upon the Government unless set aside by a judicial proceeding.

There are cases, undoubtedly, that hold to that view of the law. The opinion read on yesterday in the case of Smith *vs.* Ewing, a decision by Judge Deady, clearly intimates that as the conclusion that he reached upon an investigation of the question, though he still leaves it doubtful, inasmuch as he says in the course of that opinion there is no direct adjudication on the question by the Supreme Court of the United States.

36 On the other hand, we have presented to us now a case decided by Judge Tripp, reported in the Northwestern Reporter, vol. 38, page 52, a very elaborate and exhaustive argument and review of the authorities on this question. He reaches the conclusion that over the action of the register and receiver the Commissioner of the Land Office or the Land Department—the Interior Department—has the right of supervision and control. That opinion, as I believe I am authorized to say, on further reflection, has shaken somewhat the opinion of the district judge on this question, but still it is a doubtful question, and, as we should have a direct decision upon it by the Supreme Court of the United States, he has concluded to adhere to that opinion, and the circuit judge has taken the other view with the view of having the Supreme Court settle it finally and definitely.

As I read the decisions of the Supreme Court, commencing as early as 13th Peters, under the act of 1836, there is a supervisory power of control in the Land Office and Interior Department over the acts of all these subordinate land agents throughout the country. I do not regard the land agents—the register and receiver—as exercising any judicial functions; they are purely ministerial officers appointed at different localities throughout the country to meet the convenience of parties who wish to make homestead and pre-emption entries on the lands that are open or subject to appropriation; they are scattered over the country for the convenience of settlers; they

37 are required by the law to report their action to the Interior Department in detail, showing every act, and I think they are simply the agents to accept or receive these entries and to accept the formal compliance with the conditions upon which the Government proposes to allow homesteaders and pre-emptors to occupy and acquire title to portions of the public domain.

The policy of the law intends to aid and promote the actual settlement of these lands. It was intended for the poor of the country. It was intended to furnish some easy means for the acquisition of actual homes, homes for *bona fide* settlers who, with honest purpose of making the land a homestead or a place of permanent residence, enter *bona fide* and with a purpose to make the settlement, which is the condition alone on which the Government proposes to allow them to purchase on the easy terms provided by the statute.

The practice of the Government since the organization of the public land system of the country has been that the Interior Department or the Land Commissioner has a right or exercised the right of supervising the action of the local agents throughout the country, and in the first case that came prominently before the Supreme Court of the United States involving that question, the case of Barnard's Heirs *vs.* Ashley's Heirs, reported in the 18th of Howard, Mr. Justice Catron, in delivering the opinion of the court, laid stress upon the fact that from the very day that the public lands were thrown open to settlement it had been the practice of the Department to supervise the action of the local agents in accepting entries and in discharging the special duties that were entrusted to them. He
38 says, in the course of that opinion, that the court could not disturb that practice, upon a doubtful construction of the law, without great impropriety. That practice has been continued from that day down to this. There is not a day or week or month since that period that the Land Department of the Government has not reviewed and supervised the action of the local officers in respect to the entries of the public lands, either by pre-emptors or homesteaders. It has been the uniform practice of the Government now for over fifty-odd years, and *that* the Supreme Court in this case of Barnard's Heirs *vs.* Ashley's Heirs attached great importance to that practice, and said that the courts could not disturb it without great impropriety, and impliedly the court found that the practice was also warranted by the law.

They base that decision, as a subsequent decision of the Supreme Court is based, reported in First Black, perhaps on the ground that by the original act of 1836, repeated in 1849, and continued down in the latter acts upon the subject of entering the public unappropriated land, that there is given to the Land Commissioner a right—a general right—of supervision.

We find that general right of supervision authorized by the act of 1836 and the later acts and carried into the Revised Statutes at sections 441 and 453, which declares that the Commissioner of the Land Department shall have a general supervision over the subject—the subject of the public lands—and the sales and disposition thereof.

I understand, as I read that decision in 18th Howard, that
39 the Supreme Court asserted the right of supervision in that case.

As I understand the case of Bell *vs.* Hearne, in 19th Howard, they asserted the right of supervision by the Land Commissioner. In the case of Bell *vs.* Hearne, in 19th Howard, the patent itself, as well as

the certificate, had issued to James Bell, when it should have been issued to John Bell, and, upon motion before the Commissioner, that certificate and entry and patent were changed from James to John Bell, James Bell's heirs resisting it to the utmost.

The Supreme Court said that the Commissioner had the right to do that thing, and, although it defeated the rights claimed by the heirs of James Bell, they held that the change was properly made by the Commissioner to John Bell.

In the case of Garland *vs.* Wynn, in the 20th Howard, the Supreme Court again reaffirm, as I understand it, this proposition; also in the case of Lytle *vs.* State, in the 22nd Howard, they reaffirm it, and in Harkness *vs.* Underhill, in First Black, they again recognize the general right of supervision by the Land Office.

In Gaines *vs.* Thompson, in 7 Wall., Mr. Justice Miller reaffirms it very clearly. In that case of Gaines *vs.* Thompson the proposed action was this: The pre-emptor had made his entry and complied with the law strictly and clearly, it seemed upon the face of the papers, and yet the Commissioner undertook to set aside that entry, and Gaines, claiming that it was valide and gave him vested
40 rights, filed his bill to enjoin the Commissioner against his action, saying it would disturb his vested rights that he had acquired in the land by his entry. The Supreme Court, speaking through Justice Miller, held that the land was the land of the Government until the title passed; that there was this supervisory action on the part of the Commissioner, and that the court could not control his discretion in the matter, and so it refused Mr. Gaines the injunction against the Commissioner which he sought in that bill under that proceeding.

In the case of the Secretary *vs.* McGarrahan, reported in 9th Wallace, the other side of the question came up, and that was this: The enterer of the land, having complied with all the requirements of the law to the satisfaction of the local officers, demanded his patent, and the Secretary declined to give it. Looking into the case and discovering what he considered to be error and fraud, he declined to issue the patent, and thereupon McGarrahan filed his petition for mandamus to compel the Secretary to do it, claiming, as counsel asserted here on yesterday, that the action of the Commissioner and Secretary in issuing the patent was merely ministerial; that the judicial act had been performed when the register and receiver had received the money and accepted the entry; but the Supreme Court said: No; you are not entitled, Mr. McGarrahan, to a mandamus on the Secretary to compel him to issue you a patent, because it lies within his discretion, and we cannot enforce or control his discretion. We cannot compel it. He has a general supervision
41 over these subjects and we cannot control his action, and so they denied the relief that was sought, to compel the issuance of the patent; and so the cases go. Following that is Frisbie *vs.* Whitney, in 9 Wall.; Litchfield *vs.* Register, in 9 Wall.; Johnson *vs.* Towsley, in 13th Wall., holding the same general proposition. In Johnson *vs.* Towsley the Department seem to have changed the

entry and *gave* the benefit of it to a party who was not the first to make it.

In the case of Myers *vs.* Croft, 13th Wall., cited by and read for the defence, the question under consideration was not directly presented. The question there was an entirely different one. It went to the point as to how far under the statute the pre-emptor might transfer his pre-emption right. The court held that he could not transfer under the statute the pre-emption right itself, but that he might in proper cases make a transfer of the land itself or his rights in the land itself; but in that case and in all subsequent cases they hold that in making such transfer that his transferee or grantee or assignee stands precisely in his shoes and acquires no higher or greater rights as against the Government than the pre-emptor himself has acquired. I think that case does not apply here.

In Marquez *vs.* Frisbie, 101 U. S., they reaffirm these cases; and when you come to examine it on the State authorities—the States of Iowa, of California, of Minnesota, and most of the Northwestern cases (I have not had time to examine the Illinois cases cited by Mr. Clark)—sustain the right of supervision by the department.

The weight of authority in the State courts is that there is a
42 supervisory action on the part of the Commissioner of the Land Office and of the Secretary of the Interior.

Now, when you sum up all these decisions, the principle announced by the Supre- Court and uniformly adhered to may be embodied in this statement: That the jurisdiction of the court over these questions commences only when that of the department ceases by the issuance of the patent; that until the patent actually issues and while the matter is still pending before the department in any shape or form the question is not one of private rights upon which the court has any power to act. It rests alone with the department. So long as the transaction is "*in fieri*," unexecuted by the issuance of the patent, and while pending there, the courts have no jurisdiction over the action and conduct of the department in respect to these entries. In the present case there is no completed action on the part of the Land or Interior Department and no vested rights to the lands attempted to be entered.

We have in this case the receipt for the money produced here, and we suppose, in addition to that, there must be somewhere a cirtificate issued by the local register—land officer—at Marquette for these two parcels of land—one to Prell and the other to Reagan—and we have the further action of the department, indicating clearly, and dated on the 17th of November, 1885, that these entries—certificates—have been fraudulently obtained, and the land officer is directed to hold them for cancellation. We have subsequent to that, in the latter part of November, 1885, a transfer of the timber on these lands to the Spalding Lumber Company, and we have following that a notification from the Land Office at Washington
43 to the register here to give these claimants an opportunity for appeal from that action of his to the Secretary of the Interior and have this question reviewed and their rights determined by the Secretary of the Interior, the very head of the department. We

have it in proof before us that they did take such an appeal and that the cases are now pending before the Secretary of the Interior, on the appeal of the claimants, to determine whether they have a valid entry or not. The case is *in fieri;* has been "*in fieri*" since its inception. There has been no executed contract on the part of the Government for the sale of these lands, and it has never parted with the title, and the defendant parties must stand here, as we think or as one member of the court thinks, precisely as the pre-emptors stand, with no higher rights, no superior rights, but on the simple question pending before the department—as to whether they made a valid entry or not. We admit the evidence, and while my brother, the district judge, does not fully concur in this we admit the evidence, and at the close of the case we will give you a certificate of division on this question.

To which ruling defendant's counsel did then and there duly except.

44 The district judge dissented from the opinion of the circuit judge as follows:

Judge SEVERENS (dissenting):

Under ordinary circumstances I should probably not see fit to dissent from the opinion of the circuit judge in a matter of this sort, but the law is confessedly unsettled. There has been no direct decision by the Supreme Court of the United States upon the point involved. It is extremely important, and particularly so in regard to affairs in this district, that the law upon this subject should be settled finally and authoritatively, and for this reason I am constrained to adhere to the view that I expressed in another case and to dissent so that there may be a certificate of division if the result of the case should be such as to warrant it. I therefore dissent from the action that is now taken.

I will state briefly the ground upon which my holding is based. It is in substance that under the provisions of the statute providing that on proving up of claims the evidence shall be made sufficient to satisfy the register and receiver the statute has conferred upon the register and receiver a *quaesi* judicial authority, and I understand the rule of law to be that when such an authority is devolved the action of such a board or body is final until it is overturned by some direct proceeding leveled against it and

45 brought to set it aside. Until that is done that action stands as any other judicial action, and my holding is that the effect of their action cannot be attacked in this collateral way.

It seems to me that the holding of the doctrine that the action of the register and receiver may be set aside and the entry vacated by the department at Washington at any time is fraught with a great deal of difficuly, because it is notorious that the issuance of patents is delayed for many years, sometimes for a generation; sometimes, in fact, the patent never issues.

Now, the effect of holding that the action of the register and receiver is liable to be overturned at any time when the department,

in the course of its business, may reach that question or at any time before patent issues, leaves the title in a state of utter uncertainty after the certificate of entry has been issud. No man who has received his certificate and paid up for his claim would know what his rights were. No man could take a conveyance from him with any degree of certainty, but he would be constantly in peril of the proceedings taken in the register's office being upset by some action at the Land Office—some action in the future—of which he has no certainty.

It seems to me that this state of uncertainty as to the state of title, after the certificate has been issued, is such as ought to lead the courts to pause before they give to the departments the power
45½ to vacate and set aside these entries, and I find nothing in the Federal statutes which confers upon either the Commissioner or the Secretary any judicial power in this direction. It does not seem to me to be of any consequence that the Secretary and Commissioner are higher officers in authority than the register and receiver or that the register and receiver may, in some aspects, be subordinate to their direction. The substantial inquiry is, What are the functions devolved upon each? It might be well that the judicial function should be devolved upon parties near by, who could see the witnesses and form their own opinion as to the fact, and the jurisdiction to pass upon that judicial question (as I view it) be withheld from the officers at Washington, who have nothing but the cold record to look at.

I think it is a question of power, and to find out what that power is we are to look at the statute and see what that statute provides in that respect. That is all I think it necessary to say as to my opinion in the matter.

46 UNITED STATES OF AMERICA, } *ss:*
Western District of Michigan, Northern Division, }

I, F. M. Moore, deputy clerk of the circuit court of the United States of America for the northern division of the western district of Michigan, do hereby certify that the annexed is a true transcript of the files and journal entries constituting the record of the case of The United States *vs.* Spalding Lumber Company, now remaining on file and of record in my office, and of the whole thereof; that I have compared said transcript with the original record so remaining in my office, and that it is a correct transcript therefrom and of the whole of said original, and is hereby transmitted in obedience to the command of the said writ of error.

I further certify that the assignments of error and citation and the notice of the issuing of said writ of error and citation and of the filing of the bond in said cause, hereto annexed, are the original assignments of error and a true transcript of the citation and notice and of the affidavit of proof of service of said notice, and also a transcript of the original certificate of division filed by the judges sitting in said cause, and also a copy of the writ of error issued in said cause referred to in said notice and filed with me with said proof of service of said notice.

And I do further certify that a true transcript of the opinions of the circuit and district judges filed in said cause are hereto annexed, and that the foregoing constitutes the entire record of the pro-
47 ceedings and of papers filed in said cause.

Seal of the U. S. Circuit Court, Western District of Mich., Northern Division.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court this twenty-eighth day of September, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

F. M. MOORE,

Dep. Clerk of U. S. Circuit Court, West. Dist. of Mich., Nor. Div.

Endorsed on cover: W. Michigan C. C. U. S. No. 193. The Spalding Lumber Company, plaintiff in error, *vs.* The United States. Filed October 9, 1888.

FILED
SEP
JAMES. H.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

No. 193.

SPALDING LUMBER COMPANY,
Plaintiff in Error.
v.
THE UNITED STATES.

Error to the Circuit Court of the United States, for the Western District of Michigan, Northern Division.

BRIEF OF F. O. CLARK FOR APPELLANT.

MINING JOURNAL PRINT.
MARQUETTE, MICH.,
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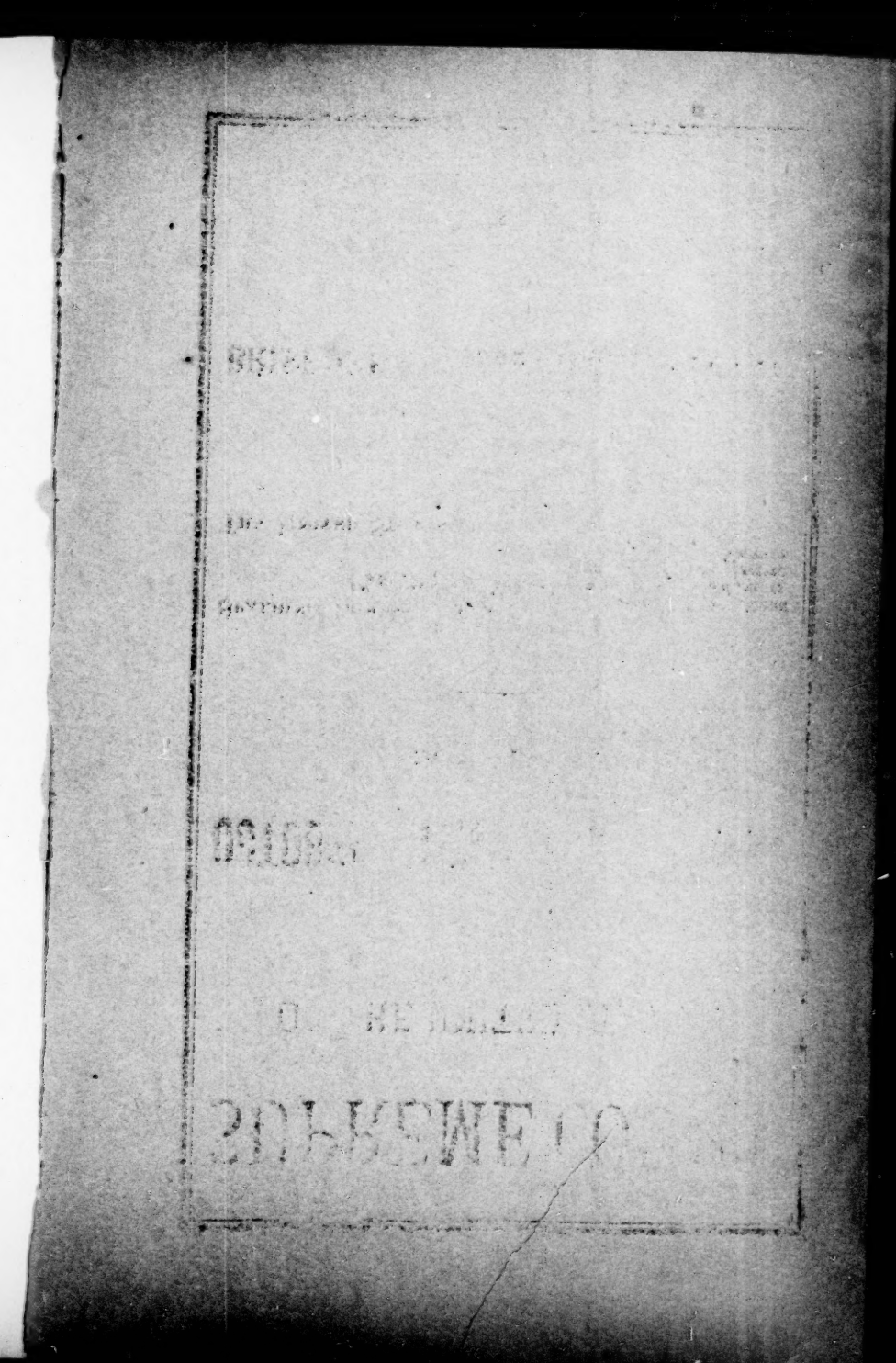

Supreme Court of the United States.

OCTOBER TERM A.D. 1891.

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SPALDING LUMBER COMPANY,
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Error to the Circuit Court of the United States, for the Western District of Michigan, Northern Division.

BRIEF FOR APPELLANT.

STATEMENT OF THE FACTS.

I.

May it please the Court:

The plaintiff in error, and defendant in the court below, is a corporation carrying on a lumbering business in the county of Menominee, in the Upper Peninsula of Michigan; manufacturing saw logs into lumber for the Chicago market.

It appears that on the 20th of October, 1882, one John Reagan made pre-emtion entry in the Marquette United States land office, upon the southeast quarter of the southwest quarter, and

the southwest quarter of the southeast quarter of section thirty (30), in township thirty-seven (37) north of range twenty-five (25) west. And one George A. Prell also made pre-emption entry in the same land office for the south half of the northeast quarter, and the north half of the southeast quarter of the same section, town and range. [See page 11 of Record].

It also appears that on December eleventh, eighteen hundred and eighty-three, both Reagan and Prell each respectively appeared before the register and receiver of the Marquette U. S. land office, with their witnesses, in accordance with the U. S. statute, and there made final proof of their settlement, improvement and cultivation, in accordance with the provisions of the pre-emption law, to the *satisfaction* of those officers; and each made the oath required by the statute on such final proof, in respect to the land claimed by them severally; and at the same time, having satisfied the register and receiver of the United States land office, as to their settlement, improvement and cultivation of the land, in accordance with the provisions of the statute, they each paid the purchase price of the land, according to the price fixed by the government. Reagan paying for his eighty acres, *two hundred dollars*, and Prell for his one hundred and sixty acres, *four hundred dollars*, and each received *their certificate of purchase from the register and receiver* of the Marquette United States land office, for the land which they had so purchased. Showing that their proofs were satisfactory to the register and receiver.

These facts thus far stated stand admitted upon the record, as certified by the circuit and district judges, who disagreed in opinion, and certified their division on pages twelve, thirteen and fourteen of the record.

It further appears, and is also admitted that on the twenty-third day of November, eighteen hundred and eighty-five, Reagan for six hundred dollars sold to Prell by an instrument in writing, duly acknowledged and recorded in the office of the register of deeds of the proper county, all the pine timber standing on the land so pre-empted by him; and upon the twenty-seventh day of the same month, Prell sold to the defendant in this suit all the pine timber standing on the lands pre-empted by himself, as well as Reagan, agreeing to deliver said pine timber on the bank of a stream in the neighborhood, manufactured into logs, for the sum of six dollars and fifty cents per thousand feet, board measure. [See page 13 of record].

It is also admitted that the defendant received these logs, which amounted to six hundred and fifty-one thousand and ninety-five feet, and paid for them at the rate named above, and that the defendant appropriated the logs to its own use. [See page 13 of record].

A criminal prosecution was brought by the United States Government against both Prell and Reagan, as trespassers upon the government land, for the cutting of this timber on their pre-emption claims, after they had made their final proof in compliance with the statute, as to settlement, im-

provement and cultivation, and as to their good faith, as settlers, which proof was made to the *satisfaction* of the register and receiver, the officers authorized by the statute of the United States to *determine* whether such settlement, improvement and cultivation, had been such as to show good faith in the settler, and to entitle them to pay the price for the land and receive their certificates of purchase.

It also appears that a complaint had been lodged with the commissioner of the general land office at Washington, against Prell and Reagan, that they had not acted in good faith, as to their pre-emption claims; and that by a letter dated November seventeenth, eighteen hundred and eighty-five, addressed to the register and receiver of the Marquette U. S. land office, the commissioner of the general land office ordered that both of the said pre-emption entries be held for cancellation, for want of proper settlement, improvement and cultivation, and ordered that the pre-emtors be allowed sixty days in which to appeal to the Secretary of the Interoir. [See page 13 of record].

It further appears that Reagan and Prell did appeal within the time fixed, to the secretary of the interior. That no order was made by the secretary until September nineteenth, eighteen hundred and eighty-seven, when by a letter from the commissioner of the general land office to the register and receiver at Marquette, they were directed to consult with one Hursley, a timber agent in that locality, as to the time when a *re-*

hearing should be had before them, and that the pre-emptor should be notified of such hearing, and that the pre-emptor should have the right *to show cause why the decision of the commissioner aforesaid should not be affirmed.* [See page 13 of record].

The local land office, up to the time of the commencement of the criminal prosecution against Prell and Reagan, referred to above, had received no notice of this order of the commissioner as directed by the secretary of the interior, and the local land office had fixed *no time* for the hearing, which had been so ordered by the commissioner. [See page 13 of record].

So that at the time of bringing the criminal prosecution against Prell and Reagan, and also a criminal prosecution against the officers of the defendant company, and the civil suit in trover, which we are now considering, against the company itself for the cutting and removing of the timber from these pre-emption claims, the question of the good faith of Prell and Reagan was under consideration by the Interior Department, and a further hearing had been ordered through the commissioner of the general land office to determine whether the certificate of Prell and Reagan should be cancelled, or should be affirmed, and their title held to be good.

Thus it will be noticed that the District Attorney began the prosecution of criminal suits against Prell, Reagan and the officers of the defendant company, and also the civil suit in trover, which we are now considering, against the defendant company before the interior depart-

ment, the tribunal having the matter under consideration, had determined under this order for a special hearing whether or not the title was good in Prell and Reagan, under their pre-emption certificates, and whether or not those claims should be cancelled for fraud. These facts appearing, the district attorney forced the criminal case to trial against the employes of the defendant company. Three grounds of defense were insisted upon at the trial.

First. That there should be no trial by the court until the interior department of the government had determined finally, as to the validity of Prell and Reagan's title, and as to their good faith in making their entry, and whether the title which they had acquired, for which they had paid their money and received the certificate of the government, that their residence, settlement, cultivation and improvement *was satisfactory to the register and Receiver of the United States Land Office*, should be affirmed or cancelled. And that the prosecution was premature and unseemly, in that it prosecuted in the court at the same time that a similar inquiry was being had, by the interior department, where the two tribunals of the government might come to different conclusions.

Second. That it appearing conclusively by the certificates of the register and receiver of the United States land office, that Prell and Reagan, had made their final proofs of settlement, improvement and cultivation, to the *satisfaction of the register and receiver* of the United States

land office, and had paid their money and received those certificates of title, there was no power that could set aside that title for fraud, or for any other reason, except a court of equity.

Third. That even if the two claims just stated were not well founded, as the Spalding Lumber Company had purchased this timber *in good faith*, and for a valuable consideration, from the pre-emptors, who held these certificates of purchase from the government, and had received this lumber upon the river delivered under the contract of purchase made with the pre-emptors, neither the defendant company, or its agents were liable, having purchased in good faith, and *without notice* of any cancellation of the claim or attempted cancellation, and that even though the government should set aside the pre-emption entries, the defendant company and its agents would not, and could not, be held liable either civilly or criminally as the defendant company would have a good title to the timber.

The criminal case against the officers of the company was tried before Hon. H. F. Severens, District Judge of the Western District of Michigan, and Hon. George Sage, District Judge of Cincinnati, Ohio, they concurring in the opinion that the positions taken by the defence as to the two last points named were correct, but they did not pass upon the first; but they held:

First. That the *determination* of the register and receiver as to the proof of the pre-emptors was final, and that the commissioner of the gen-

eral land office had *no power to cancel*, or set aside their pre-emption certificate.

Second. That there being *nothing to show* that the defendants had any knowledge of the bad faith of Prell and Reagan, if there was bad faith; that under the authorities and decisions of the supreme court of the United States, the defendant company would take a good title to the timber, even though the certificates were set aside by the courts for fraud as against Prell and Reagan; Judge Severens delivering the opinion of the court which was as follows:

U. S. OF AMERICA.—*In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan.—Northern Division.*

THE UNITED STATES
vs.
JOHN MURPHY AND GEORGE H. HAGGERSON.

The Court:—(*Severens, J*).

In reference to the question which was presented yesterday afternoon, and pretty fully argued, I have examined it pretty carefully myself, and have also had some conference with my Brother Sage, and I will now state the substance

of the conclusion arrived at, and indicate in chief the grounds on which that conclusion is reached.

Section 2259 of the revised statutes, provides: That every person having the defined qualifications, "who inhabits and improves the land which he has claimed, and who has erected or shall erect a dwelling thereon, is authorized to enter with the register of the land office for the district in which such land lies, by legal subdivisions, any number of acres, not exceeding one hundred and sixty."

Passing by the intermediate sections and coming to Section 2263, it is provided that, "prior to any entries being made under and by virtue of the provisions of Section 2259, proof of the settlement and improvement thereby required, shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the secretary of the interior, and all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void."

This forbidding of assignment and transfers, has been settled, by judicial rulings, to apply to a transfer of the right of preemption, and not to the rights that are secured by the certificate of entry.

Now taking this statute in connection with the judicial decisions, which have substantially determined the construction of it, the result appears to be this: That where a party has taken the preliminary steps, for the purpose of obtaining lands under the pre-emption act, and at the

conclusion of the proper time, after the lapse of the proper period, has made his proof, filed his affidavit and presented his proof, to the satisfaction of the register and receiver, a certificate of entry issues to him.

Now, then, what is the effect—the legal efficacy of that certificate of entry? What right does it confer?

The statute has given to the receiver and the register an authority, which is judicial in its nature.

They are constituted a quasi tribunal, for the purpose of determining upon the question of fact, whether the conditions have been complied with by the preemptor.

An effect is to be given to their determination, as evidenced by the certificate of entry, as to that of the action of any other judicial officers, or tribunal, so long as that action remains unreversed, by any competent authority.

It seems to have been settled by the decisions of the courts, that the only authority competent to cancel an entry which has thus been made and the certificate issued thereon, is the judicial department of the government; hence, it follows that so long as that entry stands, and that certificate remains uncancelled, effect is to be given to it in all courts, and places, as having the validity and effect of a judicial determination of the existence of the facts, which those officers must determine, in order to satisfy themselves and issue the certificate of entry.

Now in this case, it is not claimed, so far as

any information has been given to the court, that there has been any judicial action had, for the purpose of cancelling this certificate; hence it must follow, that in all collateral proceedings, credit must be given to that certificate of entry as involving, by necessary consequence, the hearing of proofs, and their satisfactory character to the register and receiver, so that, for the purposes of this case, it would seem that the court is bound to recognize that certificate of entry, as having been issued in accordance with the provisions of the law.

The next question that follows, is, what rights are acquired by a preemptor by virtue of his certificate?

It is true, as I think, that that certificate does not transfer the legal title; that legal title is only transferred by the making of the patent: I say making, as contra distinguished from any actual delivery out of the patent office—out of the land office.

But it would seem from the decisions, which have been rendered upon this subject, that this legal title so remaining, after all the conditions precedent have been performed to entitle the party to his patent, while it is the naked legal title,—is but a mere shell, it does not embody in it any substantial right. The issuance of the patent is a mere ministerial act, which is due to the party, who has, so to speak, earned it.

As has been said in some of the decisions, it is a well known fact, that patents are not, in fact, made on these certificates, in many cases,

until many years have elapsed, settlements have been made, the country improved, and the property has been passed by devolution from grantor to grantee, the land is cleared up and is converted into an agricultural garden; and the courts seem to have recognized, that the right of the holder of the certificate, is that of the substantial ownership in the property giving the holder of it the right to transfer all the beneficial ownership in the property to another, and when the patent does in fact issue, if it issues at all, it issues simply for the benefit of the party who holds the title, but the real substantial benefits flowing out of the bare issuance of the patent, does not seem to be very material, and the consequences are rather of a technical nature, than of any substantial importance.

From this it would seem impossible to hold, that the certificate holder, having earned a patent, is not entitled to proceed with his land, as other owners of land may proceed: He may clear it up, he may cut off the timber, he may do anything else that the owner of land may do. * * * * * * * * * * * *

Gentlemen of the jury—you should render a verdict for the defendants, of not guilty.

II.

As we have said, not only was a criminal suit brought against John Murphy and George H. Haggerson, the employes of the Spalding Lumber Company, defendant and plaintiff in error in this case, but the action in trover was commenced against this company itself; and after this decision by Judges Severens and Sage quoted above, the trover case was postponed until the following term, and circuit judge Jackson was present, and Judge Severens sat with him on the trial of the trover action; Judge Severens adhering to his former opinion, Judge Jackson giving a contrary opinion, in order that the case might be certified to the Supreme Court of the United States, for an authoritative adjudication in the matter; Judge Jackson expressing doubt in the matter in the following words: "That opinion as I believe I am authorized to say on further reflection has shaken somewhat the opinion of the district judge on this question, but still *it is a doubtful question*, and as we should have a direct decision upon it by the supreme court of the United States, he has concluded to adhere to that opinion, and the circuit judge has taken the other view, with the view of having the supreme court settle it finally and definitely." [See page 15 of record].

It will then be seen that this is a very important case, affecting largely and extensively the

rights of settlers upon the public domain on the frontier country, and also a question whether or not a pre-emptor having complied with the law, which requires him to live upon the government land for six months, and make settlement, improvement and cultivation, before he shall be entitled to buy and pay for it, shall, having proved to the *satisfaction of the register and receiver* of the local land office nearest to the land, that he has made such settlement, improvement, residence and cultivation, be for years after, prevented from dealing with the land as his own, or not; and whether, as in this case, having complied with the law, as to proof of settlement, to the satisfaction of the register and receiver of the local land office, and having paid the money for the land, the full price asked by the government, and having received a certificate of such payment, he shall after a long term of years, as in this case, be harassed by unjust complaints, and prosecuted as a criminal for doing what the register and receiver has determined he has the right to do.

The fact is, that since the institution of this prosecution against Reagan and Prell, referred to above, by the officers of the government, there has been a determination by the commissioner of the general land office that their settlement and improvement was honest and in good faith, and that they were entitled to the land, and the opinions of the commissioner are as follows:

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE,

"P." *Washington, D. C., April 14, 1891.*
15,517-1889.

UNITED STATES
vs.
JEREMIAH REAGAN

Involving pre-cash entry No. 15,092, dated December 11, 1883, S. E. ¼ S. W. ¼ and S. W. of S. E. ¼ Sec. 30. T. 37 ¼ N., R. 25 W., Marquette, Michigan.

REGISTER AND RECEIVER,
United States Land Office, Marquette, Michigan.

GENTLEMEN:—The record of hearing in this case was forwarded with your letter of February 2, 1889.

The entry was held for cancellation November 17, 1885 [letter "G"], upon the ground that the claimant had failed to comply with the law in regard to residence as shown by his final proof, and by a report made by special agent John H. Welch, dated February 13, 1885.

From this action the claimant filed an appeal to the honorable secretary of the interior, who, under date of April 12, 1887, directed that a hearing be ordered.

In accordance therewith a hearing was ordered

September 19, 1887, and trial took place in January, 1889, all parties in interest being present.

The testimony submitted at the hearing is very meager, only one witness being sworn on behalf of the government. The testimony of said witness relates merely to his examination of the land nearly four years after final proof, and wholly fails to establish any bad faith on the part of the claimant.

The fact of claimant's residence upon the land prior to proof is clearly shown by his own testimony and that of other witnesses.

The testimony submitted at the hearing, in regard to claimant's residence and improvements, is in substantial accord with the facts disclosed by his final proof, which was adjudged by the register and receiver to be sufficient to warrant the issue of final certificate.

You express the opinion that while the claimant may have failed to fully comply with legal requirements in regard to residence and cultivation, you "believe that said claimant has acted in good faith, and that his claim is entitled to all possible consideration upon equitable principles."

The department has *uniformly held* that after the allowance of final entry, nothing short of *positive proof of bad faith* on the part of the entrymen, can warrant a judgment of forfeiture.

That the claimant has acted in good faith I believe there is no good reason to doubt; in fact, special agent Welch, in his report of February 13, 1885, made no charge of bad faith on the part of the entrymen.

In accordaace with the views herein expressed the contest is dismissed. Advise parties in interest.

Very respectfully.

T. H. CARTER,

Commissioner.

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

Washington, D. C., April 14, 1891.

"P" 15,518-1889.

UNITED STATES
vs.
GEORGE A. PRELL.

Involving pre. cash entry No. 15,003, dated Dec. 11, 1883, S. ½ N. E. ¼ and N. ½ S. E. ¼ Sec. 30, T. 37, N. R. 25 W, Marquette, Michigan.

REGISTER AND RECEIVER,

United States Land Office, Marquette, Michigan.

GENTLEMEN:—The record of hearing in this case was forwarded with your letter of February 2, 1889.

The entry in question was held for cancellation by this office [letter "G"] November 17, 1885, upon the ground of insufficient residence as shown by final proof and by special agent Welch's report of February 14, 1885.

Hearing was ordered September 19, 1887, and trial took place in January, 1889, all parties in interest being present. The special agent intro-

duced only one witness on behalf of the government. He testified that he visited the claim in the fall of 1883, and in July 1887. The claimant and his family were living there in the fall of 1883, but no one appeared to be living there in July, 1887, though witness saw a pretty good house "about 18x26 feet," and certain other improvements. There is nothing in his testimony tending to show bad faith on the part of the claimant.

The testimony on the part of the defense shows that the claimant substantially complied with the law in regard to residence and improvements, and I concur with you that it sufficiently establishes good faith on the part of the entryman.

The contest is therefore dismissed. Advise parties in interest.

Very respectfully,

T. H. CARTER,

Commissioner.

I refer to this for the purpose of showing that to prosecute Prell and Reagan criminally, and the defendant company in this civil suit, and its officers by a criminal action, *before the final determination* of the title of Prell and Reagan, by the interior department, even under the claim of the defendant in error, *is unseemly and unjust*, and creates confusion and conflict in the judicial determination of the same facts in the different departments of the government, which is anarchy, and must have the effect to produce anything but respect and confidence in the administration of government affairs, and is a great wrong to the citizen.

ARGUMENT.

The assignments of error relied upon appear on pages 10 and 11 of the record, and briefly stated are as follows:

1. That the court erred, in receiving evidence as to whether the pre-emption entries of Reagan and Prell were made in good faith, it having appeared that their proof was made to the satisfaction of the register and receiver, and that they had received their certificates of purchase.

2. Because the court admitted evidence tending to show that the commissioner of the general land office had cancelled said pre-emption certificates.

3. Because the court allowed proof, as to the good faith settlement and cultivation of the said pre-emptors.

4. Because the court directed the jury to bring a verdict for the plaintiff and against the defendant.

Under this last assignment stated will be included the directing such a verdict in opposition to the certificate of the register and receiver, and also before there had been any hearing, under the order of the commissioner of the general land office, to show cause why the entry should not be cancelled; also because it took the case from the jury entirely, as to the good faith of the defendant, after the evidence on that point had been admitted by the court.

III.

We claim, that under the certified facts, that the pre-emptors having paid their money for the land and having received their certificates of purchase therefor, became the owners of the property and can sell the land or any portion of it, the same as though they had procured a patent and that the land department had no power to interfere with or cancel that title. That the certificate, when once issued, becomes the evidence that he is the equitable owner and is therefore the real owner, and that the issuing of the patent is simply a ministerial act of the government, in giving him the muniment of title. That the authority to pass upon his proofs, prior to the issuing of the certificate of purchase, is vested by the statute *entirely in the register and receiver of the district land office*, and that there is no appeal from the determination of the register and receiver, as to the pre-emptors having complied with the law, in the matter of settlement, residence, cultivation and improvement, and that when the register and receiver have so determined, and issued to the pre-emptor his certificate of purchase, he having paid his money for the land, that there is no power that can set aside that certificate and take from him his title, except a court of equity, upon proof of mistake or fraud. And even then can-

not take away the title of a purchaser from him who has acted in good faith.

Section 2262, revised statues of the U. S. provides:

"Before any person claiming the benefit of this chapter is allowed to enter lands, he shall make oath before the register or receiver of the land district in which the land is situated that he has never had the benefit of any right of pre-emption under section 2259; that he is not the owner of 320 acres of land in any state or territory; that he has not settled upon and improved such lands to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not directly or indirectly, made any agreement or contract in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself; and if any person taking such oath, swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same; and any grant or conveyance, which he may have made, *except in the hands of bona fide purchasers, for a valuable consideration*, shall be null and void, except as provided in section 2288. And it shall be the the duty of the officer administering such oath to file a certificate thereof in public land office of such district, and to transmit a duplicate copy to the general land office, *either of which shall be good and sufficient evidence* that such oath was *administered* according to the law."

It will be noticed, that the pre-emptor's title may be set aside for false swearing or fraud of any kind: and that in that event he shall lose the money which he shall have paid and all his title to the land, but it *excepts the bona fide purchasers from him for a valuable consideration in this penalty which he must suffer for his fraud.*

In the next section of the statute, 2263, it provides:

Prior to any entries being made under and by virtue of the provisions of section 2259, *proof* of the *settlement* and *improvement thereby required* shall be made to the *satisfaction* of the *register and receiver* of the land district *in which such lands lie*, agreeably to such rules as may be prescribed by the Secretary of the Interior. And all assignments and transfers of the *right* hereby secured, prior to the issuing of the patent, shall be null and void.

It will be noticed that this statute expressly provides, that the register and receiver shall have the power to *determine* whether the pre-emptor has complied with the law, in the making of his settlement upon the land, and upon their determination he shall have the right to make the entry of the land upon which he has previously settled and made improvements, according to the rules fixed by the secretary of the interior viz: for the term of six months and more, and shall have the right to pay for the same at the minimum price fixed by the government and receive his title, his certificate of purchase entitling him to a patent, as

soon as that work shall be reached in due course of business in the land department.

Now it is conceded, that the pre-emptors, Prell and Reagan had made such proof, to the satisfaction of the register and receiver of the Marquette U. S. Land Office; that they had paid their money for the land and received their certificates of purchase. (See pages 12 and 13 of the record). And that after Reagan had sold his timber to Prell, and Prell had lumbered this timber on both his own pre-emption claim, and that of Reagan, and had delivered the same upon the banks of the river and received $6.50 a thousand for the same from the defendant, the defendant having *no notice* of any order of cancellation by the commissioner, or that the titles of the pre-emptors were questioned after their certificates were issued or that the commissioners of the general land office had ordered that these pre-emption claims be held for cancellation, "for want of proper settlement, improvement and cultivation." (See page 13 of the record.) It appears that subsequent to the order of the Commissioner, the Secretary of the Interior ordered that a *special hearing* be had before the *register and receiver* of the Marquette U. S. land office, at a time to be fixed by such officers, and the special timber agent, Hursley, after notifying the pre-emptors, at which time the pre-emptors should be called upon, "*To show cause why said decision of the commissioner aforesaid should not be affirmed,*" namely, that of cancellation, because the settlement, improvement and cultivation had not been to his, the *commissioner's satisfaction*,

as then appeared to him probably from the report of the special timber agent, or some such source.

The *first* question then arises, had the commissioner power to make any such cancellation, or to *review* the action of the register and receiver, as to their *determination* that the proofs of the pre-emptors were *satisfactory*, and in compliance with the law? We assert, the Commissioner had *no such power*. It is not given to him in terms by any act of Congress; but the statute does, *in express terms* provide that "Proof of settlement and improvement *shall* be made to *the satisfaction of the register and receiver of the land district in which such lands lie*."

The only provision of the statute allowing the commissioner to review the action of the register and receiver as to such pre-emption proof, is contained in section 2273, which is as follows: "When *two or more persons settle on the same* tract of land, the right of preemption shall be in him who made the first settlement, provided such person conforms to the other provisions of law; and all questions as to the right of pre-emption arising between *different settlers* shall be determined by the register and receiver of the district within which the land is situated; and *appeals* from the decision of district officers, in *cases of contest for the right of preemption*, shall be made to the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior."

This grants to the commissioner and to the secre-

tary of the interior, the right of review, where there are *conflicting settlers* upon the land, and that upon appeal by one of these settlers, from the decision of the register and receiver. That is the *extent* of the right of review. Nowhere is there *any qualification* of section 2263 of the statute, which *absolutely imposes* upon the register and receiver the right of *final* determination as to the satisfaction of the proof, except, as we have said under the provisions of section 2273, where there is shown a conflicting settler, with the right of appeal under that section. There is no such conflicting settler here, claiming any such right of appeal, or making any claim. It is the government or some special agent of the government raising the question, after years have elapsed, as to the satisfactory character of the settlement of the pre-emptors, and undertaking to prosecute purchasers in good faith, for the timber that they have purchased from these preemptors. Can this be done? As will be seen from the record, District Judge Severens, of the district where this case was tried, held it could not be done, Circuit Judge Jackson holding the contrary view. As previously stated above, Judge Sage of Cincinnati concurred in the opinion of Judge Severens.

This question was carefully reviewed by Judge Deady, in the U. S. Circuit Court for Oregon, in the case of Smith v. Ewing et. al. in 23rd Federal Reporter, page 741, in which case, after a very learned review of the subject, he held that there was *no right in the commissioner to review this final determination of the register and receiver, and*

all control of the executive department of the government over the title thereafter ceases; that if any wrong has been done to the United States, the courts of justice are open to it, as in the case of an individual; to have redress by the cancellation of the patent or reconveyance of the land, and in the same case, the court held, that if a pre-emptor had made his final proof and paid his money, he would hold the title as against a public sale, made under the proclamation of the president.

In the case of *Smith* v. *Ewing*, 23rd Federal Reporter, page 745, Judge Deady used this language "To my mind, the certificate of purchase, subject to the condition mentioned, is within the reason of the rule laid down in Moore v. Robbins, in the case of a patent. The issue of a patent or final conveyance on such a certificate is a mere ministerial act, of which the purchaser, in the case of private parties, might compel the performance. Several of the state courts have decided that the certificate of purchase, when issued in due form, for land subject to entry, is beyond the power of the commissioner, otherwise than on a direct appeal from the register and receiver. In *Perry* v. *O'Hanlon*, 11 Mo. 585, the supreme court of Missouri held that a *cancellation of a pre-emption certificate by the commissioner was a nullity.* To the same effect is the ruling in *Brill* v. *Stiles* 35 Ill. 309; *Cornelius* v. *Kessel*, 58 Wis. 241; S. C. 16 N. W. Rep. 550."

Now what answer is made to this argument, that the commissioner has no power to cancel a

pre-emption certificate? It will be seen in the opinion of Judge Jackson, commencing upon page 14 of the record, and upon page 15, that the learned judge used this language: "I do not regard the land agents, the register and receiver, as exercising *any judicial* functions; they are purely ministerial officers, appointed at different localities throughout the country, to meet the convenience of parties, who wish to make homestead and pre-emption entries on the lands that are open or subject to appropriation." The learned Judge further says, as appears upon page 16 of the record: "The practice of the Government since the organization of the public land system of the country has been that the Interior Department or the land commissioner has a right or exercised the right of supervising the action of the local agents throughout the country, and in the first case that came prominently before the supreme court of the United States involving that question, the case of *Barnard's heirs* v. *Ashley's heirs*, reported in the 18th of Howard, Mr. Justice Catron, in delivering the opinion of the court, laid stress upon the fact that from the very day that the public lands were thrown open to settlement, it had been the practice of the department to supervise the action of the local agents in accepting entries and discharging the special duties that were entrusted to them. He says, in the course of that opinion, that the court could not disturb that practice, upon *a doubtful construction of the law, without great impropriety*."

From this it will be seen, that Judge Jackson

based his dissenting opinion from the judgment of Judges Severens and Sage, upon what we assert to be an error of law, when he says, "I do not regard the land agents, the register and receiver, as exercising *any judicial functions.*" This is beyond all question an error, as the statutes of the United States expressly make the register and receiver quasi judicial officers, with the power to hear contests between conflicting parties, to take proofs in various matters, and render a judicial decision, that shall determine the rights of citizens, as to property acquired or sought to be acquired from the public domain, and the right of appeal, in many cases, lies to the commissioner of the general land office, who is also made by the statutes, a quasi-judicial officer, and an appeal also lies from the commissioner to the Secretary of the Interior, making him also a quasi-judicial officer, in fact he is the final tribunal for the determining of certain judicial questions, in connection with conflicts in the land department of the government and between parties seeking to acquire lands from the government, by homestead, and many other ways.

And as will be seen, by section 2263 of the revised statutes, it is expressly provided that "Proof of the settlement and improvement thereby required, *shall be made to the satisfaction of the register and receiver of the land district, in which the lands lie.*" Under this statute, they have the right, and have always exercised the right of taking proofs, pro and con, for the purpose of determining in *judicial form* whether or not the pre-

emptor has complied with the law as to settlement, improvement and cultivation, and this the statute requires them to do. Any person claiming that the pre-emptor has not complied with the law has the right at such hearing to present adverse proofs, and the register and receiver must determine the matter between these conflicting proofs. This makes their duties expressly judicial in that regard. No court does any more than to determine controversies between the parties upon conflicting proofs, under the law as marked down by the statutes and the unwritten law of the land. So we say that Judge Jackson, in differing in opinion on this point, from Judges Deady, Severens and Sage, has based his opinion upon an error of law.

Judge Jackson uses this further language, quoted above, referring to 18th Howard: "He says, in the course of that opinion that the court could not disturb the practice, upon a *doubtful* construction of the law, without great impropriety." This is the quotation from the opinion of Justice Catron in *Barnard's heirs* v. *Ashley's heirs*. Undoubtedly that is true, but is there any *doubtful interpretation* of the statute, section 2262 given by Judges Deady, Severens and Sage, when they hold that that statute expressly gives to the register and receiver the exclusive power to determine whether the proofs of the pre-emptor show that he has complied with the law, as to pre-emption and settlement, such as to entitle him *to buy* the land and pay for it under the pre-emption statute, and in holding that there is no appeal to

the commissioner in that regard, except as given by the statute in section 2273, which marks out that such appeal exists where there are conflicting settlers upon the land, claiming adverse rights to the land? There is no room for doubt as to the construction of those statutes; they are plain, unambiguous and certain and the courts are bound by such plain provisions of the pre-emption act.

Judge Jackson further says, as appears upon page 16 of the record: "The practice of the government since the organization of the public land system of the country has been that the interior department or the land commissioner has a right or exercised the right of supervising the action of the local agents throughout the country." That is undoubtedly correct. The statutes of the United states expressly provide for such supervision, as to the machinery of the land department, of which the secretary of the interior is the head, and the commissioner has the supervisory control of the ministerial acts of the register and receiver and the secretary of the interior has supervisory control of the commissioner in those matters, but when it comes to the exercise of judicial functions the commissioner cannot act in place of the register and receiver, in taking original proofs. He can only act upon appeal or upon the certification of a divided opinion by the register and receiver, and the secretary of the interior can only act in a judicial capacity, determining as to proofs taken upon appeal from the commissioner, or upon the matter being brought before him by some other legal writ.

Now it is important we should inquire, why congress gave this exclusive authority to the register and receiver, to determine as to the sufficiency of the pre-emptor's proof. It is a very just and wise provision. The pre-emptor does not ask the government to give him the land, as does the homesteader; he asks the privilege to buy it. He is required by the pre-emption act to live upon and improve the land for only six months, in order to be entitled to make entry of and pay for it. The homesteader is required to live upon the land five years, before he shall receive the gift from the government; he cannot make his proofs until the five years have elapsed, but the pre-emptor is to occupy long enough to give reasonable satisfaction to the government that he intends to make his home there. It was for the purpose of inducing settlement that the statute was made, and when he proposes to pay for the land, he should not be compelled to wait for the slow motion of the cumbrous departments at Washington, which may delay a year and more in hearing his case, (the department now being, as I know, over two years behind in its decision and as shown by its delays appearing by the certified facts of this case), in determining whether his proof is such as to entitle him to pay for the land and own it, when he would have the right to cut and sell timber from off the land, to assist him in his development and improvement, and congress evidently considered that it was proper that the local land office, consisting of the register and receiver, being the office nearest to the land, the

easiest to be informed as to the facts of settlement, should have the exclusive power of determination whether the pre-emptor's proof was satisfactory, to entitle him to enter the land and pay for it and receive his certificate, and that there was no particular reason why that matter should not be *conclusively determined* by the local officers, especially when the right exists in the court to set aside such pre-emption certificate, the same as any deed may be, when procured by fraud. And it is no answer to the express provision of the statute, giving such power to the register and receiver, that the commissioner has *assumed in the past* to do what the statute has never authorized him to do. We find such errors committed in the departments of both state and general government by an assumption of authority not warranted by law, and this court has frequently been called upon to so hold, and after such assumption has been practiced for a long time; for instance, the commissioner of the general land office formerly assumed to cancel patents, after issuing them, and this court was called upon to hold, and did hold, that the land department of the government had no power to cancel a patent when once issued, and so held in the case referred to above of *Moore* v. *Robbins*, 96 U. S. 538.

For what purpose is this certificate of pre-emption given? It is to show that the pre-emptor has made his proof, as the statute provides, to the satisfaction of the register and receiver; that he has been permitted to buy the land, and that he has paid the price fixed by the government.

Then, why is not this certificate as complete evidence of an equitable title in the land, as the patent issued by the commissioner of the general land office would be of a legal one? If so, why should it be set aside, after the lapse of three or four years, as in this case, upon the assertion of someone, possibly by a *moiety man*, that the pre-emptor's proof, at the time of purchase, was not complete, and why assert that after witnesses may be dead or scattered, and when they cannot be easily procured by the pre-emptor, and he be prosecuted as a criminal in the courts, as well as the persons, to whom he may have sold timber, to assist him in making the improvements, and then the purchaser be sued, as in this case, in trover for the full value of the lumber manufactured from the logs taken from the land. It is simply the working out of a stupendous piece of governmental oppression, which the observance of the statute, section 2263, would largely avoid and was intended to avoid by that statute. The pre-emption and homestead laws were both made for the encouragement of settlement upon the public domain, and not to prevent it, as such prosecutions as this one will tend to do.

There is a further very important reason, why congress should make such a statute and give the register and receiver the power to make exclusive determination as to whether the pre-emptor has complied with the law as to settlement, so as to entitle him to buy and pay for the land. If, after the pre-emptor has made his proof of such settlement to the satisfaction of the register and re-

ceiver and they have received his money and given him a certificate of purchase, complaints may still be lodged against the pre-emptor with the register and receiver, or the commissioner of the general land office, by special timber agents, as well as moiety men, men who receive one half of the penalty inflicted for trespass on the public lands, for their discovering of such violation, as detectives, it opens the widest possible door to most outrageous fraud and oppression, and perjury, on the part of moity men, and their accomplices, who, for the moiety they can receive, in many instances go to the greatest length in compassing the ruin of homesteaders, pre-emptors and those honestly dealing with them, and these moiety men are like vultures, hovering around honest settlers, seeking in some way to entrap the settler and to obtain blood money from him, and if the pre-emptor, having bought his land and paid for it, may be hauled up by complaints lodged against him of fraudulent intent, because he has sold some of his timber, or for any reason, after years have elapsed, and that, upon the complaint of those moiety men, and he be compelled to defend his title before the register and receiver, before the commissioner of the general land office and before the secretary of the interior, after such lapse of time, and also before the court, on prosecutions at the same time, it will not only beggar him financially, in many cases, ruin his character when he is an honest man, but as in the case of this man Prell, referred to above, drive him to his grave with anxiety and fear, before the de-

termination is reached, even when the determination, as in the case of both Prell and Reagan, is, as shown by the decision of the commissioner, that they were honest homesteaders and their title good. Judge Jackson seems to base his opinion upon the case of *Barnard's heirs* v. *Ashley's heirs*, 18th Howard 43, being the opinion of Justice Catron, where he held that the commissioner had power to revise the finding of the register and receiver, under *his general supervisory power;* but since that opinion, in the case of *Johnson* v. *Towsley*, 13 Wallace 72, the supreme court, by Justice Miller, held, that the supervisory power of the commissioner was suspended by the statute of 1841, and the case of the *United States* v. *Butterworth* 112 U. S. 50, settles that *quasi-judicial decisions of the executive officers cannot be controlled or reviewed by superior officers, unless the power to do so is expressly given by statute, merely general supervisory powers not being sufficient.* Notes of Gould and Tucker on revised statutes of the United States page 527.

In the case of the *United States* v. *Butterworth*, 112 U. S. pages 50-51, the court uses this language: "The authority and power claimed for the Secretary of the Interior are asserted and maintained upon these general grounds; that he is the head of the department of which the patent office is a bureau; that the Secretary is charged by section 441, revised statutes, with the supervision of public business relating to patents, etc. * * " (This is the very same section referred to by Judge Jackon, in his opinion,

As referred to above, Judge Jackson erred when he held, as appears upon page 15 of the record, as follows: "I do not regard the land agents, the register and receiver, as exercising any judicial functions; they are purely ministerial officers."

The courts have held to the contrary, viz: That the decision of the officers of the land departments on the facts (whether the pre-emptor has settled upon and inhabited and improved the land) was a judicial decision upon the testimony before them, and is conclusive and final as between the United States and him.

Warren v. *Van Brunt*, 19 Wall, 652.
Shelpley v. *Cowen*, 91 U. S. 340.
Marquez v. *Frisbee*, 101 U. S. 576.
Moore v. *Robbins*, 96 U. S. 533.
Quinby v. *Conlan*, 104 U. S. 425.
Aiken v. *Ferry*, 6th Sawyer 79.
Vance v. *Burbank*, 101 U. S. 519.

"Decisions by registers and receivers upon the facts offered to prove the right to pre-empt lands *are conclusive*."

Third volume attorney-general's opinions, 93-104.

Notes of Gould & Tucker on revised statutes, 503.

But should the court hold that the prosecution of this case against the defendant company was not premature, as we claim, and that the register and receiver did not have the sole power of determination as to the satisfactory character of the proof of settlement and cultivation of the pre-

emptor, then we say that the defendant is not liable in this action because it is an innocent purchaser for a valuable consideration, without notice of any claim of fraud on the part of the government, or that any fraud existed.

This question was adjudicated in this court, in the case of *Myers* vs. *Croft*, 13 Wall. 291, where the court held that the pre-emptor, having obtained his certificate, had the right to make sale of the land or interests in the land; the court also holding that the pre-emptor could not assign or dispose of his *right of pre-emption*, but that having exercised that right and acquired the property under it by certificate, he might sell a portion of the property; and the court also held that a bona fide purchaser from the pre-emptor, for a valuable consideration, *would acquire a good title* even though the pre-emptor was not a bona fide holder, and even though the entry was cancelled for fraud on the part of the pre-emptor.

The language of the court in that case, is as follows: "In case of false swearing, the pre-emptor was subject to a prosecution for perjury and forfeited the money he had paid for the land, and any grant or conveyance made by him, before the entry was declared null and void, *with an exception in favor of bona fide purchasers, for a valuable consideration.*"

This position is sustained in the case of
Quinby v. *Conlan*, 104 U. S. 422.
6 Sawyer page 87.
Smith v. *Ewing*, 23 Fed. Rep. 741.
Richards v. *Snyder*, 11 Oregon 501.

Brown v. *Warren*, 16 Nev. 228.
Cady v. *Engmey*, 54 Iowa.
Sillyman v. *King*, 36 Iowa 207.

This has also been held as the doctrine, of the interior department. Secretary Chandler, in the case of *Hensley* v. *Ayers*, in his letter of instructions to Commissioner Burdette, dated April 20th, 1876, which is found in 1st. Copp's Public Land Laws, vol. I, at page 616, held as follows: "Where a pre-emptor makes final proof and payment and certificate for patent issues, such certificate *may be assigned* to a *bona fide purchaser for value, and he will be protected in his purchase*; the good faith of the purchaser must be established by the facts in the case, beyond question, but when so established, his rights *cannot be invaded* by showing that his grantor failed to comply with the law."

Secretary Chandler, in the case cited, quotes as follows from 13th Wallace: "This certificate vests in the pre-emptor an assignable interest in the land. *Myers* v. *Croft*, 13 Wall. 291."

Then again, in *Thomas* v. *St. Joseph and Denver City R. R. Co.*, Secretary Chandler to Commissioner Williams, February 7th, 1877, found, as appears in 2nd Vol. of Copp's Land Laws, page 869, as follows: "Not until all the preliminary acts, including payment and entry were performed, was any vested right in the land secured by the settler. When the entry is made, a vested right is acquired, *which may be transferred.* * * * * * When the entry is made and certificate given, the particular land is segregated from the mass of public lands and *becomes private property.*"

So it will be seen, that both the circuit and supreme courts of the United States, and the secretary of the interior, have held that, the pre-emptor having made his proof and obtained his certificate, may sell his land, or an interest in it, and convey a good title to a purchaser in good faith, and even though fraud may be subsequently shown, as against the pre-emptor, unless the purchaser had knowledge of the fraud prior to making his purchase, the purchaser would hold a good title to the property, even though the pre-emptor lost what might remain of his title and be prosecuted for the fraud.

The certificate of the judges as to the facts in this case, contains the following: "It also appeared, that the defendant had *no notice* of the order of cancellation of the entries by the commissioner above mentioned, until after the timber sued for had been received, and that on getting such notice, they directed that no more be taken." (See pages 13 and 14 of record.) Thus stating the fact upon the record, that the company had no notice of any order of cancellation or that the government asserted any irregularity as to the entries, at the time of purchasing and receiving the timber that the company did receive, and when they received notice of such order directed that no more timber be taken.

It also appears, that an agent and a secretary of the defendant company, prior to the date of the final proof of the pre-emptors, filed with the register and receiver of the Marquette U. S. Land Office affidavits, alleging facts against the allowing

erty of the United States; it is segregated thereby from the public lands, and is no longer subject to sale; the government holds the legal title only in trust for the holder of the certificate.

Deffeback v. *Hawke*, 115 U. S. 392.
Simons v. *Wagner*, 101 U. S. 260.
Carroll v. *Safford*, 3rd How. 441.
People v. *Shearer*, 30 Cal. 648.
Gwynne v. *Niswenger*, 15 Ohio 367.
Astrom v. *Hammond*, 3rd Mclean 107.
Witherspoon v. *Duncan*, 4 Wall. 210.
Hughes v. *U. S.*, 4 Wall. 232.

The government holds the legal title only in trust for the holder of the certificate, and this is true, even where the certificate was obtained by fraud.

Stark v. *Star*, 6 Wall. 402.

The certificate is, so far as the acquisition of title by any one else is concerned, equivalent to a patent.

Deffeback v. *Hawke*, 115 U. S. 392.
Simons v. *Ogle*, 105 U. S. 271.
Simons v. *Wagner*, 101 U. S. 260.
Stark v. *Star*, 6 Wall. 402.

A final certificate of entry and purchase can no more be cancelled than a patent.

Carroll v. *Safford*, 3rd How. 441.
Boyce v. *Danz*, 29 Mich. 146.
Darsey v. *McCarthy*, 12 Pacific Rep. (Kansas) 104.
Hosmer v. *Wallace*, 47 Cal. 461.

F. O. CLARK,
Attorney for Appellant.

Office Supreme Court U. S.
FILED.
MAR 7 1892
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THE SPALDING LUMBER COMPANY, plaintiff in error,
vs.
THE UNITED STATES.
} No. 193.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THE SPALDING LUMBER COMPANY, plaintiff in error, *vs.* THE UNITED STATES. } No. 193.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error from the circuit court of the United States for the western district of Michigan, taken out under section 693, wherein the judges of that court have certified that their opinions were opposed upon a question which occurred on the trial of this suit. The amount of the judgment (record, p. 6) is $4,823.84, less

than sufficient to give this court jurisdiction in error except on a certificate of division in opinion by the judges of that court. The certificate of division is stated as follows (Rec., p. 12):

CERTIFICATE OF DIVISON.

UNITED STATES OF AMERICA:

The circuit court of the United States for the sixth circuit and western district of Michigan, northern division.

THE UNITED STATES
vs.
SPALDING LUMBER COMPANY.

At a session of said court held at Marquette on the 3d day of August, A. D. 1888, this cause came on for trial before a jury, duly empanelled for that purpose, Hon. Howell E. Jackson, circuit judge, and Hon. Henery E. Severens, district judge, being present.

The action was in trover, brought to recover the value of a quantity of pine alleged to have been the property of the United States and to have been cut and taken from certain lands in Michigan, described as the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter, the south half of the northeast quarter and the north half of the southeast quarter of section 30, in township 37 north, of range 25 west.

It was admitted on behalf of the parties that on the 20th day of October, 1882, John Reagan filed his declaratory statement for preëmption entry of the first two of the above descriptions with the register and receiver of the land office at Marquette, that be-

ing the proper office, and that on the same day George A. Prell filed his declaratory statement for the like entry for the last two of said descriptions with the same officer.

It was also admitted that on Dec. 11th, 1883, the said Reagan and Prell respectively appeared with their witnesses before the register and receiver of the said land office, and there made final proof to the satisfaction of those officers of the settlement, improvement, and cultivation by them respectively of the lands included in their declaratory statements aforesaid, and each made the oath required by the statute on such final proof in respect to the land claimed by them severally; and, at the same time, they each paid into the office aforesaid the price of the said lands, the said Reagan the sum of $200 and the said Prell the sum of $400, and each received *their* certificate of purchase for the lands so purchased by them.

It was further admitted that on the 23d day of November, 1885, the said Reagan, for the price of $600, sold to said Prell, by an instrument duly acknowledged and recorded in the office of the register of deeds of the proper county, all the pine timber standing on the land so preëmpted by him, and that on the 27th day of the same month the said Prell sold to the defendant in this suit all the pine timber standing on the lands so preëmpted by Reagan and himself for the sum of $6.50 per 1,000 feet, delivered on the bank of a stream in the neighborhood.

It was also admitted that the defendant received and paid for under this contract 651,095 feet of the timber on said land, and that the same was worth the contract price, viz., $6.50 per 1,000, and that the defendant appropriated it to its own use..

This was the conversion sued for.

And thereupon the district attorney proposed and offered evidence for the purpose of proving that the said Reagan and Prell, respectively, did not enter the said lands in good faith, and did not, in fact, settle upon, improve, and cultivate the said land in such a manner as required by law, but that, on the contrary, this residence on the land was casual only, and the cultivation and improvement were of trifling extent and character, and that the preëmptors were residents of Wisconsin and never became residents of this State; that on November 17, 1885, the Commissioner of the General Land Office, by letter addressed to the register and receiver, ordered that both of said preëmption entries be held for cancellation for want of proper settlement, improvement, and cultivation, and ordered that the preëmptors be allowed sixty days in which to appeal to the Secretary of the Interior.

It was shown in this connection that the said Reagan and Prell appealed within the sixty days to the Secretary of the Interior, but that no direction or order was made by the Secretary thereon until September 19, 1887, when, by letter from the Commissioner of the Land Office to the register and receiver, at Marquette, they were directed to consult with one Hursley, a timber agent in that locality, as to the time when a hearing should be had before them, and that the preëmptors aforesaid should be notified thereof, and that they should show cause why the said decision of the Commissioner aforesaid should not be affirmed. No notice of this letter and order was ever given to the preëmptors and no time for hearing was ever fixed. It also appeared that the defendant had not notice of the order for cancellation of the entries by the Commissioner above mentioned until after the timber sued for had been re-

ceived, and that on getting such notice they directed that no more be taken.

Whereupon the following questions of law arose for determination by the court:

First. Whether it was competent for the Commissioner of the General Land Office under the circumstances hereinbefore stated to cancel the entries and certificates aforesaid.

Second. Whether such cancellation would prevent a valid purchase from a certificate holder of the timber on the lands by a purchaser having no notice thereof.

Upon each of said questions the said circuit and district judges were divided in opinion.

And thereupon, in accordance with the opinion of the circuit judge, the proof so offered was received and evidence was given upon the question (which was controverted by the defendant) whether the residence, settlement, cultivation, and improvement by the preëmptors were such as to warrant the issuance of the certificates, and proof was made of the cancellation of the certificates by the Commissioner in the manner as above stated.

It was also shown that an agent and the secretary of the defendant prior to the date of the final proof by the preëmptors made and filed with the register and receiver of the Marquette land office affidavits of facts being within their knowledge or information negativing the right to make the entries, and again in a few days after the certificates were made and in the same month filed similar affidavits with the Commissioner of the Land Office.

The court instructed the jury to find a verdict for the plaintiff, which was done accordingly, in the sum of $4,823.84, and a judgment was entered thereon in favor of the plaintiff for that sum with cost of the action.

And upon request of counsel for the defendant the foregoing questions upon which the judges were divided in opinion as aforesaid are certified to the Supreme Court of the United States for its decision and answer, to the end that due proceedings be here further taken in the action.

Dated August 10, A. D. 1888.

HOWELL E. JACKSON,
Circuit Judge.

H. F. SEVERENS,
District Judge.

It will be seen from this statement that the action was in trover by the United States to recover the value of the timber taken by the defendant from land claimed by the United States and converted by the defendant to its own use. The controversy turned on the ownership of the land from which the timber was taken. The defendant had purchased the timber from one Prell, who claimed title to the same by virtue of final certificates of entry under the preëmption laws upon the land in question. One certificate of entry had been issued to him directly by the register and receiver of the United States Land Office and the other had been purchased by him from one Reagan, to whom it had been issued under the same preëmption law. The cutting and conversion of the timber by the defendant were not disputed.

The Government then offered evidence to show that Reagan and Prell had not entered the lands in good faith, and had not settled, improved, and cultivated them as required by law; that they were not in fact and did not become residents of Michigan, where the lands were, but were residents of Wisconsin, and that ten days before the de-

fendant purchased the timber from Prell, and five days before Prell purchased from Reagan his certificate of entry, the Commissioner of the General Land Office had ordered the register and receiver to hold the preëmption entries for cancellation for want of proper settlement, improvement, and cultivation, allowing the preëmptors sixty days in which to appeal to the Secretary of the Interior. The suit was brought pending this appeal. The questions seem to have arisen from the statement of the court on the admission of evidence as to the *bona fides* of the settlement by Prell and Reagan, and, as stated by the court, they are as follows:

> First, whether it was competent for the Commissioner of the General Land Office, under the circumstances hereinbefore stated, to cancel the entries and certificates aforesaid.
>
> Second, whether such cancellation would prevent a valid purchase from a certificate holder of the timber on the lands by a purchaser having no notice thereof.

ARGUMENT.

I.

CONCERNING THE ASSIGNMENTS OF ERROR.

It appears from the statements of the judges that after the evidence, the relevancy of which depended upon an answer to these questions, was admitted, the case proceeded to a close, and the jury were directed by the court to return a verdict for the plaintiff. The only questions certified are those which are given above, and as the court acquires no jurisdiction to consider this case, except by

the certificate of division, it is submitted that no other question can be considered by this court in reaching a conclusion whether the judgment of the lower court should be affirmed. We do not understand that the change which was made by the first section of the act of June 1, 1872 (17 Stat., 196), in any way affects or increases the subject-matter to be examined by the court on such review beyond what the court could decide under section 6 of the act of April 29, 1802 (2 Stat., 159). This follows from the language of the first section of the act of June 1, 1872, which is:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whenever, in any suit or proceeding in a circuit court of the United States, being held by a justice of the Supreme Court and the circuit judge or a district judge, or by the circuit judge and a district judge, there shall occur any difference of opinion between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or the presiding judge shall prevail, and be considered the opinion of the court for the time being; but when a final judgment, decree, or order in such suit or proceeding shall be entered, if said judges shall certify, as it shall be their duty to do if such be the fact, that they differed in opinion as to any question to which, under the act of Congress of April twenty-ninth, eighteen hundred and two, might have been reviewed by the Supreme Court on certificate of difference of opinion, then either party may remove said final judgment, decree, or order to the Supreme Court on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error or appeals in regard to bail and supersedeas.

The effect of that section was merely to change the form by which the case was brought up for review. If the opinion of the prevailing judge on the questions certified is sustained, then the judgment must be affirmed without regard to the question whether subsequently, at another part of the case, he ruled erroneously. There being no difference of opinion between the judges on this ruling, and the sole ground of jurisdiction in error being a difference of opinion, there can be no jurisdiction to examine and reverse it. It was settled in the case of *Ogle* vs. *Lee* (2 Cranch, 33) that under the act of 1802 the only question which could be considered by the court on a certificate of division was the question certified; and that, we submit, is the rule to-day, where the cases are brought up on writ of error under section 693, which is but the embodiment of the first section of the act of June 1, 1872, above quoted.

These remarks are submitted with reference to the assignments of error made by the counsel for the plaintiff in error, on pages 10 and 11 of the record.

The first assignment of error is the admission of evidence offered by the United States to show the want of good faith in the preëmption entries made by Reagan and Prell to impeach the preëmption certificates of the register and receiver; and the second assignment of error is the admission of evidence to show that the Commissioner of the General Land Office had canceled these preëmption entries. Both judges of the court concurred in the view that this evidence was admissible if the Commissioner of the General Land Office had power under the law to can-

cel the entries for the reasons stated; and the only question therefore to be considered here with reference to these assignments of error is whether such power did exist in the Commissioner of the General Land Office.

The third assignment of error was that the court allowed the proof, in spite of the fact that it appears that the lumber company, the defendant below, was a purchaser in good faith and without notice, that there had been any fraud in the preëmption entries, or that the certificates had been held for cancellation. This assignment of error turns wholly on the question certified whether, after cancellation of a preëmption entry, a purchaser without notice of the cancellation can derive a good title against the United States.

The fourth assignment of error is that the circuit court directed the jury to render a verdict against the defendant below on the evidence as adduced. Whether the court was right in this or not can not be here examined; the evidence having been admitted on the ruling of the circuit judge, there was no further difference between the judges as to the charge to be delivered to the jury. It is not competent, therefore, here to examine the question whether, on the evidence admitted, the peremptory direction was correct or not, and the direction can not, therefore, be properly assigned for error.

The same is true as to the fifth assignment of error.

The assignments of error therefore proper to be considered here are the second and third, which raise the questions certified by the court, and these questions we now propose to examine.

FIRST QUESTION.

The first question is whether the Commissioner of the General Land Office has power under the statute to cancel a final certificate of purchase issued by the register and receiver of a local land office to a preëmptor of public lands. The sections of the Revised Statutes involved in this controversy are as follows:

> SEC. 2259. Every person, being the head of a family, or widow, or single person, over the age of twenty-one years, and a citizen of the United States, or having filed a declaration of intention to become such, as required by the naturalization laws, who has made, or hereafter makes, a settlement in person on the public lands subject to pre-emption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter with the register of the land-office for the district in which such land lies, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter-section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land.
>
> SEC. 2262. Before any person claiming the benefit of this chapter is allowed to enter lands he shall make oath before the receiver or register of the land district in which the land is situated that he has never had the benefit of any right of preëmption under section twenty-two hundred and fifty-nine; that he is not the owner of three hundred and twenty acres of land in any State or Territory; that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use, and that he has not, directly or indirectly, made any agreement or contract, in any way

or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself, and if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land and all right and title to the same, and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, for a valuable consideration, shall be null and void, except as provided in section twenty-two hundred and eighty-eight. And it shall be the duty of the officer administering such oath to file a certificate thereof in the public land office of such district, and to transmit a duplicate copy to the General Land Office, either of which shall be good and sufficient evidence that such oath was administered according to law.

SEC. 2263. Prior to any entries being made under and by virtue of the provisions of section twenty-two hundred and fifty-nine, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the Secretary of the Interior; and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void.

The claim made is that under section 2263 the action of the register and receiver of the land district in determining whether the proof of a settlement and improvement is sufficient under the law, is an exercise of quasi judicial power, and is final, so far as executive officers are concerned; that neither the Commissioner of the General Land Office nor the Secretary of the Interior has any

power to set aside the action of these officers in making this decision or to cancel the entry which follows thereupon; that the right to a patent after such a certificate becomes a vested right and equivalent in every respect to a legal title, to set aside which only a court of equity may be appealed to. Counsel attempt to sustain this view by reference to section 2273, Revised Statutes, which is as follows:

> SEC. 2273. When two or more persons settle on the same tract of land, the right of preëmption shall be in him who made the first settlement, provided such person conforms to the other provision of the law; and all questions as to the right of preëmption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated; and appeals from the decisions of district officers, in cases of contest for the right of preëmption, shall be made to the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior.

This express provision for appeal and revision in contested preëmption cases is said to exclude the implication of the existence of appeal or revision in uncontested preemption claims.

The conclusion contended for is that the action of the register and receiver in an uncontested claim for preemption finally binds the United States to the issuance of a patent, and puts the Government in a position from which, in case of a fraud or defective compliance with the law, it can not be relieved except by the action of a court of equity, but that if the right of preëmption is con-

tested by a private individual, then the decision of the register and receiver is not final, but that either individual may appeal to the Commissioner of the General Land Office under section 2273, and appeal from his decision to the Secretary of the Interior. If this is the condition of the law then it must be admitted that it is anomalous. Local land officers are thereby permitted to bind the United States by fraudulent entries, beyond relief except in a court of equity, whereas privat econtestants may have the benefit of the examination of the Commissioner of the General Land Office and the Secretary of the Interior.

It will be admitted that registers and receivers are subordinates of the Commissioner and the Secretary. It is now suggested that in the event of a decision against the Government by these subordinate officers on a preëmption entry, the Commissioner of the General Land Office and the Secretary of the Interior are obliged, in order to set aside the decision, to apply to the Attorney-General to file a bill in equity attacking the same. Of course if this is the law, it must be so enforced; but we respectfully submit that it is astonishing that Congress should prescribe such a procedure. If it is the law, then there are certain corollaries to the main proposition. One is that as the preëmption entry allowed by a register and receiver gives to the preëmptor a vested right to the patent, the officer charged with the issuance of the patent must issue it, and has no discretion to refuse it on the ground that the preëmption entry was not properly allowed. In other words, the issuance of the patent becomes a mere ministerial duty, which the President may not refuse to perform, and which his subordinates charged with the

duty of issuing it may be compelled to perform by writ of mandamus. This, as we shall show by a number of adjudicated cases, is not the law. As the corollary can not be sustained, the main proposition must also fall.

Section 2263 first appeared as the third section of the act of May 29, 1830 (4 Stat., 420). That act, though not having general application to all settlers upon the public land, but only to those in possession in 1829, was continued in force by subsequent acts and its application extended. See acts of January 23, 1832 (4 Stat., 503); act of July 14, 1832 (4 Stat., 603); act of March 2, 1833 (4 Stat., 63); act of June 19, 1884 (4 Stat., 678); act of June 22, 1838 (5 Stat., 251); act of June 1, 1840 (5 Stat., 382). The act of September 4, 1841 (5 Stat., 453), was the establishment of the present preëmption laws, and section 3 of the act of 1830 reappeared as section 12 of the new act, with the change that the decision was to be rendered under rules laid down by the Secretary of the Treasury, instead of the Commissioner of the General Land Office. Section 12 of the act of 1841 is now section 2263 of the Revised Statutes, with the exception that the rules of decision under the present section are to be prescribed by the Secretary of the Interior.

The clause as it appeared in the act of 1830 was under consideration by Attorney-General Butler, April 21, 1836, who held that the decisions of the registers and receivers upon the facts offered to establish preëmption rights under the act of May 29, 1830, were conclusive; that they acted in a judicial capacity in weighing and passing upon the sufficiency of the evidence offered, and though they

were to observe the rules prescribed by the Commissioner of the General Land Office, they could not be compelled to act upon any judgment but their own. He held, however, that the issuing of patents depended on the Commissioner, who could suspend the issuance thereof where the decisions of the register and receiver had been obtained by fraud, or had been founded in material errors of fact or law. This opinion was rendered on the 21st of April, 1836 (3 Opin. Atty. Gen., 93.) On July 4 of that year, the Land Office was reorganized (5th Stat., 107). The first section of that act provided as follows:

> That from and after the passage of this act the executive duties now prescribed or which may hereafter be prescribed by law appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and also such as relate to private claims of land and the issuing of patents for all grants of land under the authority of the Government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States.

Section 5 provided for the appointment of a solicitor of the General Land Office, whose duty it was to examine and present a report to the Commissioner of the state of facts in all cases referred by the Commissioner to him, involving questions of law, or where the facts were in controversy between agents of the Government and individuals, or where there were conflicting claims of parties before the Department, with his opinion thereon, and to advise the Commissioner upon all questions growing out of the

management of the public lands or the title thereto, private land claims, Virginia military scrip, bounty, land, and preëmption claims. Unless by this act a revisory power over the action of registers and receivers on preëmption entries was not given the Commissioner of the General Land Office, it is difficult to see what advice he could ask from the solicitor in regard to preëmption claims. For it should be noted that at the time of this act there was no express provision for appeal in contested preëmption cases.

The first section of the act of July 4, 1836, has been embodied in section 453 of the Revised Statutes as follows:

> The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

The effect of the act of 1836 upon the clause of the preëmption law requiring that proof of preëmption, settlement, and cultivation should be made to the satisfaction of the receiver and register of the land office in giving to the Commissioner of the General Land Office power of review over the action of the register and receiver in allowing preëmption entries, came directly before the court in the case of *Barnard's Heirs* vs. *Ashley's Heirs, et al.* (18 Howard, 43), and Mr. Justice Catron, speaking for the court, decided that the Commissioner of

the General Land Office had such power by virtue of the act of 1836. The language of the learned justice is as follows:

> In cases arising under the preëmption laws of the 29th of May, 1830, and of the 19th of June, 1834, the power of ascertaining and deciding on the facts which entitled a party to the right of preëmption was vested in the register and receiver of the land district in which the land was situated, from whose decision there was no direct appeal to higher authority. But, even under these laws, the proof on which the claim was to rest was to be made "agreeably to the rules to be prescribed by the Commissioner of the General Land Office," and, if not so made, the entry would be suspended when the proceeding was brought before the Commissioner by an opposing claimant. In cases, however, like the one before us, where an entry had been allowed on *ex parte* affidavits, which were impeached, and the land claimed by another, founded on an opposing entry, the course pursued at the General Land Office was to return the proofs and allegations in opposition to the entry to the district office, with instructions to call all the parties before the register and receiver, with a view of instituting an inquiry into the matters charged, allowing each party, on due notice, an opportunity of cross-examining the witnesses of the other, each being allowed to introduce proofs; and, on the close of the investigation, the register and receiver were instructed to report the proceeding to the General Land Office, with their opinion as to the effect of the proof and the case made by the additional testimony. And, on this return, the Commissioner does, in fact, exercise a supervision over the acts of the register and receiver.

> This power of revision is exercised by virtue of the act of July 4, 1836, § 1, which provides "that, from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands; and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office under the direction of the President of the United States." The necessity of "supervision and control" vested in the Commissioner, acting under the direction of the President, is too manifest to require comment, further than to say that the facts found in this record show that nothing is more easily done than apparently to establish by *ex parte* affidavits, cultivation, and possession of particular quarter sections of land, when the fact is untrue. That the act of 1836 modifies the powers of registers and receivers to the extent of the Commissioner's action in the instances before us, we hold to be true. But, if the construction of the act of 1836 to this effect were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety.

In the case of *Johnson* v. *Towsley* (13 Wallace, 72), the court reiterated these principles through Mr. Justice Miller, as follows:

> By the first section of the act to reorganize the General Land Office, approved July 4, 1836, it was enacted that the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining to the surveying and sale of the public lands,

> * * * and the issuing of patents for all grants of lands, under the authority of the United States, shall be subject to the supervision and control of the General Land Office, under the direction of the President of the United States. In the case of *Barnard's Heirs* v. *Ashley's Heirs* it was held that this authorized the Commissioner to entertain appeals from the decisions of the register and receiver in regard to preëmption claims, and it is obvious that the direct control of the President was contemplated whenever it might be invoked. Afterward, when the act of September 4, 1841, was passed, which so enlarged the right of preëmption as to have been ever since considered the main source of preëmption rights, the eleventh section provided that all questions as to the right of preëmption arising between different settlers should be settled by the register and receiver of the district within which the land is situated, subject to an appeal to and revision by the Secretary of the Treasury of the United States. This provision, in the class of cases to which it referred, superseded the functions of the Commissioner of the Land Office as revising officer to the register and receiver, and, so far as the act of 1836 associated the President with the Commissioner, superseded his supervisory functions also.

Referring to the case of *Barnard's Heirs* vs. *Ashley's Heirs* (18 How., 43), opposing counsel uses this language (page 37 of his brief):

> But since that opinion, in the case of *Johnson* vs. *Towsley* (13 Wall., 72), the Supreme Court, by Justice Miller, held that the supervisory power of the commissioner was suspended by the statute of 1841.

This is an inaccurate statement, as will be seen by the language we have just quoted from Mr. Justice Miller.

All that he said was that the act of 1841 in providing an appeal in contested cases under preëmption claims to the Secretary of the Treasury took away, *as to contested cases only*, the supervisory power of the Land Commissioner, which up to that time existed, under the act of 1836, over contested as well as uncontested cases under the preëmption laws. The act of 1841 still left the uncontested cases under the supervisory control of the Commissioner of the General Land Office.

It is, therefore, clear that in the opinion of the Supreme Court the act of 1836 conferred on the Commissioner of the General Land Office jurisdiction to revise and control the action of the register and receiver in determining the proof of a preëmptor to be sufficient, in making the entry and in issuing the final certificate of purchase. It is of importance to note that section 2273, expressly giving the right of appeal to the Commissioner of the General Land Office and the Secretary of the Interior in cases of contest for preëmption entries between individuals, first appeared in the act of September 4, 1841, section 11 (5 Stat., 456), where the appeal was given to the Secretary of the Treasury direct, without going through the General Land Office.

This history of the section robs the express provision for appeal as to contested cases in section 2273 of any significance in indicating that it was not the intention of Congress to provide an appeal for revision in uncontested entries, for it thereby appears that before this section became law in the act of 1841 the power of appeal or revision with reference to uncontested preëmption entries already existed under the first section of the act of 1836, as construed by the Supreme Court.

The question of the power of the Commissioner of the General Land Office to set aside an entry allowed by a register and receiver was before the court in *Harkness and Wife* vs. *Underhill* (1 Black Reports, 316–325). The head-note of that case is:

> A fraudulent entry of public land allowed by a register and receiver upon false proofs of settlement, occupancy, and housekeeping may be set aside and vacated by the Commissioner of the General Land Office.

Said Mr. Justice Catron in that case:

> The question is again raised whether this entry, having been allowed by the register and receiver, could be set aside by the Commissioner. All the officers administering the public-land laws were bound by the regulations published May 6, 1836 (2 LL. & O., 82). These regulations prescribed the mode of proceedings to vacate a fraudulent occupant entry and were pursued in the case before the court. This question has several times been raised and decided in this court, upholding the Commissioner's powers.

Citing *Garland* vs. *Winn* (20 Howard, 8), *Lytle* vs. *State of Arkansas* (22 Howard, 193).

In *Witherspoon* vs. *Duncan* (4 Wallace, 210), the question was whether preëmption entries for which certificates had been issued by the register and receiver of the Land Office were subject to taxation under the laws of Arkansas, and it was held that they were, following in this respect the case of *Carroll* vs. *Safford* (3 Howard, 450). In the latter case the preëmption entry had been a cash entry. In *Witherspoon* vs. *Duncan*, it was a donation

entry, and it was insisted that there was a difference. Responding to this argument, Mr. Justice Davis used the following language:

> But it is insisted that there is a difference between a cash and a donation entry—that the one may be complete when the money is paid, but the other is not perfected until it is confirmed by the General Land Office and the patent issued. * * *
>
> The claim *was* allowed, the selections made, and a certificate of entry given, and it was their duty to see that the taxes were paid. *It is true that the entry might be set aside at Washington; but this condition attaches to all entries of the public lands.*

The view of the law above contended for is again set forth by Mr. Justice Field in *Quinby* vs. *Conlan* (104 U. S., 420–425), as follows:

> The laws of the United States prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. They require personal settlement upon the lands desired, and their inhabitation and improvement, and a declaration of the settler's acts and purposes to be made in the proper office of the district, within a limited time after the public surveys have been extended over the lands. By them a Land Department has been created to supervise all the various steps required for the acquisition of the title of the Government. Its officers are required to receive, consider, and pass upon the proofs furnished as to the alleged settlements upon the lands, and their improvement when preëmption rights are claimed, and, in case of conflicting claims to the same tract, to hear the contesting parties. The proof offered in compliance with the law are to be presented, in the first instance, to the officers of the

> district where the land is situated, and from their decision an appeal lies to the Commissioner of the General Land Office, and from him to the Secretary of the Interior. For mere errors of judgment as to the weight of evidence on these subjects, by any of the subordinate officers, the only remedy is an appeal to his superior of the Department.

Again, in the case of *Lee* vs. *Johnson* (116 U. S., 48–52) the question was whether the Secretary of the Interior might set aside a homestead entry allowed by a register and receiver on a ground not urged upon him or presented to him by the contestant, and it was held that he could. He canceled the entry on the ground that the person to whom the certificate had been issued was not a *bona fide* homestead claimant acting in good faith. Say the court:

> Under these circumstances, so far from having exceeded his jurisdiction in directing a cancellation of the entry, he was exercising only that just supervision which the law vests in him over all proceedings instituted to acquire portions of the public lands.

The same general principle was announced by Mr. Justice Lamar in the case of *Knight* vs. *The United States Land Association* (142 U. S., 161). See particularly the language of the learned justice on page 178.

It was noted by Mr. Justice Catron in 1855, in the case of *Barnard's Heirs* vs. *Ashley's Heirs* (18 How., 43), whose language we have quoted above, that the practice for twenty years had been under the law to give the Commissioner of the Land Office supervisory control over preëmption entries allowed by registers and receivers. Since that time

the invariable practice in the Interior Department has been the same. There are numerous land decisions affirming the same doctrine. We refer to a few:

United States v. *Johnson et al.* (5 L. D., 442), decision by Acting Secretary Muldrow; *Pueblo of San Francisco* (5 L. D., 494), decision by Secretary Lamar; *Ex parte, Leonard F. Case* (6 L. D., 255), decision by Acting Secretary Muldrow; *Edward Wiswell* (6 L. D., 265), decision by Acting Secretary Muldrow; *C. A. Kibling* (7 L. D., 327), decision by Assistant Secretary Muldrow; *Smith* v. *Custer* (8 L. D., 269), decision by Secretary Vilas; *Traveler's Insurance Company* (9 L. D., 316), decision by Assistant Secretary Chandler; *John W. Setchel* (9 L. D., 573), decision by Assistant Secretary Chandler; *Richardson* v. *Moore* (10 L. D., 415), decision by Assistant Secretary Chandler; *United States* v. *Montgomery et al.* (11 L. D., 484), decision by Secretary Noble; *Charles F. Glass* (12 L. D., 313), decision by Assistant Secretary Chandler; *Fleming* v. *Bowie* (on review) (13 L. D., 78); *George Hayne, et al.* (13 L. D., 388).

The whole question was reëxamined by Mr. Secretary Vilas in 1887, and he disposes of the matter so forcibly that we feel justified in quoting at length from his opinion in the case of *Smith* vs. *Custer* (8 L. D., 269):

> The exercise of the jurisdiction questioned has been continuous for a half century or more; indeed, it may be said to have begun with the public-land system; but, as the mode of disposition of the public domain was originally simple, and generally by direct sale, the number of cases in which such a jurisdiction was exercised was comparatively few in the

earlier years of the Government. Since the provision of numerous other methods for acquiring title to public lands, and the change of policy by which direct sales have become few, there has been a great augmentation of the necessity and instances in which the Land Office and the Department should interfere. But, notwithstanding the long and continued usage, parties still frequently contest the jurisdiction.

Yet at this time there are many cases reported in the law books, upon adjudication by both State and Federal courts, in which the point is discussed; and, although I have heard two oral discussions of the question, I do not think it necessary to review the cases or present elaborate argument in support of the conclusion arrived at. I think it very clear upon the statutes and upon the adjudged cases that the jurisdiction of the land office and the Department stands as well established as the right of almost any tribunal or office of the Government to the exercise of any function which it may possess.

It appears to be conceded, in all the arguments in favor of a contrary view to which my attention has been drawn, that the jurisdiction is clear in cases of contest between two or more settlers claiming the same tract of land, because section 2273 of the Revised Statutes, following the provision in the act of 1841, after laying down generally the rule that the first settlement gives the better right, proceeds to add:

"And all questions as to the right of preëmption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated; and appeals from the decision of district officers, in cases of contest for the right of preëmption, shall be made to the Commissioner of the General Land Office, whose decision

shall be final, unless appeal therefrom be taken to the Secretary of the Interior."

It will be apparent on brief reflection that this certainly gives the jurisdiction to hear all the inquiries and adjudge all the points which may go to the validity of an entry, provided only some other settler contests; because it is plain that in such a controversy, if one settler showed that the other claimant was not entitled at all to the right of preëmption, he, if himself entitled, must clearly prevail, although the other might have made the first settlement. The consequence of this position, therefore, is that while the General Land Office and the Department may exercise this jurisdiction at the instigation of a claimant, it may not be done when the Government alone is interested. It would therefore follow that the Government might be deprived of its lands without authority of law whenever the register and receiver saw fit to permit it to be done, or committed an error otherwise, without any power in the Bureau or Department to protect the interests of the Government. Then the Land Office or Department might prevent the illegal acquisition of the national title at the instance of some other claimant, but could not in the interest of law or of the Government as a proprietor. This theory is based upon the expressed grant of appeal in the case mentioned in section 2273, and because section 2263 reads as follows, without providing an appeal:

"Prior to any entries being made under and by virtue of the provisions of section 2259, proof of the settlement and improvement thereby required shall be made *to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the Secretary of the Interior*, and all assignments and

transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void."

This is a mere inference, however, from the use of language probably employed with no such purpose; but, at all events, the inference is inconsistent with other statutes, to which the phrase "agreeably to such rules as may be prescribed by the Secretary of the Interior" clearly refers. The power to make these rules lies in the grant of authority which comprehends the jurisdiction in question. These statutes are now incorporated with the revision of 1873.

Section 441 provides:

"The Secretary of the Interior is charged with the supervision of public business relating to the follow-subjects: * * * Second. The public lands, including mines."

Section 453 provides:

"The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties pertaining to the surveying and sale of the public lands of the United States, *or in anywise respecting such public lands*, and also such as relate to private claims of land, and the *issuing of patents* for all grants of land under the authority of the Government."

When one considers the nature of the public business relating to lands and the modes of conducting it, as prescribed by the statutes, the comprehensive grasp of this authority and the sufficiency of these words as a grant of the full measure necessary become apparent.

The acquisition of the public land through the right of preëmption is but one of many modes; but, as the one involved in this case, attention will be limited to it. The statutes prescribe many conditions, first, certain classes of lands only are subject

to the right; secondly, certain classes of persons only may exercise the right; thirdly, certain acts must be done on the land to acquire the right; and, finally, certain proofs, probatory of these points and others, must be made in order to enjoy it. It is now a clearly established doctrine that the preëmption claimant acquires no right to the public land until full compliance with and performance of all these conditions and final payment. *Frisbie* v. *Whitney* (9 Wall., 187); the *Yosemite Valley Case* (15 Wall., 77). The law provides for the issuance of patents by the President with all the machinery of a bureau equipped for the preservation of all information concerning the circumstances, condition, and disposition of the public lands; the local offices are subordinate agencies for the transaction of the business committed to the General Land Office; the Commissioner is charged with the performance of "all executive duties" relating to the subject; and the Secretary with supervision of the entire public business concerning the lands; and the register and receiver can act only agreeably to the rules prescribed by the Secretary. Under such circumstances, is it to be rationally supposed that the law intended to leave it to the register and receiver to disregard all the limitations and conditions prescribed by statute, or the rules of the Secretary, without any right to review their action on the part of the Commissioner, who is charged with all executive duties, or the Secretary, who is charged with supervision over all? Such a theory makes the subordinate the superior, and inverts the order of authority and administration.

It must be conceded by all, to put a plain case, that if a preëmption claimant should impose by his false affidavit upon the local officers, the United States are entitled to some redress. Is that redress only to be

had by an action in the courts? If so, from what does the necessity arise? The title is still in the Government, and no right to it has been acquired. Or suppose the local officers should be satisfied, so as to accept payment and issue a receipt upon proofs which upon their face disclose plain noncompliance with law or the regulations, is the President, by whose patent alone can the title pass, bound to issue that patent? Such instances, and one readily multiplies them on reflection, demonstrate the legislation of Congress in the creation of bureau and department to be absurd, or that this theory is inadmissible.

In further manifestation of the legislative will, Congress has for many years provided a class of officers, whose duty is, under the direction of the Commissioner of the General Land Office, to examine cases which have been passed by the local officers, with a view to ascertaining whether the facts warrant approval of the action of those officers by the issuance of a patent. This action has been taken year after year, with full knowledge of the claim of jurisdiction; indeed, in avowed aid and support of the exercise of that jurisdiction. If a doubt could exist of the sufficiency of previous legislation to confer it, this regular course of appropriation would itself be sufficient to endow it with all the vigor of Congressional sanction.

But aside from the long maintenance of this authority by departmental assertion, and its long recognition by Congress, the Supreme Court has abundantly adjudged its rightful existence in numerous cases, has defined its limits, and itself has acknowledged the duty of obedience to the determinations made in its proper exercise. Few questions stand more completely adjudged by that tribunal, almost every effect of the power having been in some form

considered. So that it is not surprising that at last the court has been led to use the following langange in *Steel* v. *Smelting Company* (106 U. S., 450).

"We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public land, that it creates an unpleasant surprise to find that counsel in discussing the effect to be given to the action of that Department overlook our decisions on the subject. That Department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

And see, *Harkness et ux.* v. *Underhill* (1 Black, 316); *United States* v. *Schurz* (102 U. S., 401); *Lee* v. *Johnson* (116 U. S., 48).

The extent and quality of this power have been as clearly recognized as its existence has been established. The decision of the Department upon a question of fact is final and conclusive upon the courts. In *Shepley* against *Cowan*, *supra*, in which one party sought to maintain his claim by showing the falsity of the proofs presented in support of the preëmption right which the Department had adjudged

in the other's favor, the court said, speaking of the action of the General Land Office:

"There is no evidence of any fraud or imposition practiced upon them, or that they erred in the construction of any law applicable to the case. It is only contended that they erred in their deductions from the proofs presented; and for errors of that kind, where the parties interested had notice of the proceedings before the Land Department, and were permittted to contest the same, as in the present case, the courts can furnish no remedy. The officers of the Land Department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of preëmption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or if they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors *of judgment* upon the weight of evidence in a contested case before them, the *only remedy is by appeal from one officer to another of the Department*, and perhaps, under special circumstances, to the President (91 U. S., 340)."

And see also *Johnson* v. *Towsley* (*supra*); *Quinby* v. *Conlan* (104 U. S., 420); *Vance* v. *Burbank* (101 U. S., 514); *Simmons* v. *Wagner* (101 U. S., 260); *United States* v. *Minor* (114 U. S., 243); *Baldwin* v. *Stark* (107 U. S., 463); *Lee* v. *Johnson* (*supra*).

And in further acknowledgment of the conclusive power of the Land Department, it has been determined that no writ of mandamus will lie nor injunction go to interfere with the exercise of that judgment which the law reposes in the Secretary or the Commissioner,

while the matter is properly before either for action. *Gaines* v. *Thompson* (7 Wall., 347); *Secretary* v. *McGarrahan* (9 Wall., 298).

Nor will the courts assume to exercise any jurisdiction upon a case depending in the Land Office or the Department. *Marquis* v. *Frisby* (101 U. S., 473).

And finally the court has determined that the term of this jurisdiction expires with the issuance of a patent. *Moore* v. *Robbins* (96 U. S., 530); *United States* v. *Schurz* (102 U. S., 378).

Nothing further can be desired in the way of judicial determination in favor of this jurisdiction. But in many cases by the State courts it has been upheld. In an able opinion by Chief Justice Tripp, of Dakota, in *United States* v. *Dudley*, published in 1887, these cases have been collated and reviewed. Reference to that opinion will amply satisfy the inquirer. An opinion to the contrary by Deady, *J.*, in *Smith* v. *Ewing* (23 Federal Reporter, 741), may be left to its contest with this weight of authority and to the clear perception of its force in another case by that same judge, reported as *Aiken* v. *Ferry* (6 Sawyer, 79).

A most learned and exhaustive opinion on this subject by Chief Justice Tripp, speaking for the supreme court of Dakota, will be found in the case of *Vantongeren* vs. *Heffernan* (5 Dakota Repts., 180; s. c. 38 Northwestern Reporter, 53).

Only two Federal authorities can be found to the contrary. One is a decision by Judge Deady in *Smith* vs. *Ewing* (23 Fed. Rep., 741), and the other a decision by Judge Severens quoted in the brief of opposing counsel. It is respectfully submitted that in view of a half century's practice, the repeated decisions by this court, and many

decisions by the State courts to which reference is made in the Dakota opinion above referred to, the judgment of even so learned a judge as Judge Deady must yield.

Counsel for the plaintiff in error relies upon several decisions of this court which relate to the character of the title held by a certificate-holder under a preëmption claim. They are *Carroll* vs. *Safford* (3 How., 460) and *Myers* vs. *Croft* (13 Wall., 291). These cases establish that when a man has legally proved up his preëmption claim and received a certificate, he has the equitable title to the land, and that on such a title he may properly be taxed by the State; but both cases show that his title is merely an equitable one, that is, it is a title which depends for its validity on the legality and bona fides of the acts done by the holder for the purpose of securing it, and that it is subject to confirmation or cancellation by the officers superior to the register and receiver in the land department of the Government, to wit, the Commissioner of the General Land Office and the Secretary of the Interior. It is merely evidence of an equitable title, and is transferable as such under the decision in *Myers* vs. *Croft* (13 Wall., 291). That, however, is not at all inconsistent with the power of the Commissioner of the General Land Office and of the Secretary of the Interior to rectify any fraud or mistake of fact or law in the action of the officers who allowed the entry and issued the certificate, by canceling the same.

There is no similarity between the decisions of the register and receiver and the decisions of the Commissioner of Patents so far as relates to the power of the Secretary of the Interior to review them, and the case of *Butterworth*

vs. *Hoe* (112 U. S., 50), so much relied on, has no application here. In that case an appeal was expressly provided from the Commissioner to the supreme court of the District of Columbia, and this court held, in view of that provision of the law, it would not uphold the right of review in the Secretary of the Interior under his general supervisory power; that it could not be supposed that Congress would provide two appeals from the same tribunal. The distinction between this class of cases and the Butterworth case is very clearly brought out by Mr. Justice Lamar in his decision as Secretary of the Interior in *The Pueblo of San Francisco* (5 L. D., 483–495).

SECOND QUESTION.

The second question is whether one who purchases for a valuable consideration a final certificate from a preëmption entryman without notice of any defects therein, acquires any title against the United States if the entry has been cancelled and the certificate is held for cancellation by the Commissioner of the General Land Office.

The previous statement of facts shows that the cancellation took place before the purchase. The answer to this question depends, of course, upon the character of the title which a certificate-holder owns in the land. It is an equitable title. The legal title remains in the United States until the patent issues. It is a well-settled principle of equity jurisprudence that as between the holders of equities the legal title will prevail.

The equity of the United States in the land here in dispute is the right to hold the land until it shall have

been honestly earned under the preëmption laws by the alleged preëmptor. The equity of the defendant below grows out of his purchase of the apparent equitable title without notice of its defects. The United States still owns the legal title. Therefore its equity, added to its legal title, must prevail. The purchaser of the seeming equity without notice takes nothing but what his grantor has. (*Shirras* vs. *Caig*, 7 *Cranch*, 34; *Vattier* vs. *Hinde*, 7 *Peters*, 252; *Hallett* vs. *Collins*, 10 *How.*, 174.)

The entry having been canceled, the preëmptors, Prell and Reagan in this case, had nothing but a preëmption right, and had no title in the land itself. (*Hutchings* vs. *Low*, 15 Wall., 77.) Moreover, that right they were forbidden to convey under section 2263. They could not, therefore, convey to the defendant below, the lumber company, any right to take timber from the land, that being an interest in the realty. (See *Schulenberg* vs. *Harriman*, 21 Wall., 44.) The appropriation of the timber was therefore conversion. The question under discussion has been expressly decided by Mr. Justice Miller in the case of *Root* vs. *Shields* (1 Woolworth, 340). In that case persons had purchased a certificate of the preëmption entry without knowledge of any defect in the title, and it was held that as against the United States the entry not being valid, they took nothing. Said the learned justice:

> They all purchased before the issue of the patent. The more meritorious purchased after the entry had been assailed and decided against by the land office. But that is a circumstance not material to this consideration. Until the issue of the patent, the legal title remained in the United States. Had his entry

> been valid, Shields (the preëmptor) would have taken only an equity. His grantees took only an equity. They did not acquire the legal title. And in order to establish in himself the character of a bona fide purchaser, so as to be entitled to the protection of chancery, a party must show that, in his purchase and by the conveyance to him, he acquired the legal title. If he have but an equity, it is overreached by the better equity of his adversary.

This is the rule laid down by the Interior Department. See *Travelers' Insurance Company* (9 L. D., 321); *Margaret Kissack* (2 C. L. L., 421); *R. M. Chrisinger* (4 L. D., 347); *United States* vs. *Johnson* (5 L. D., 442); *C. A. Kibling* (7 L. D., 327); *C. P. Cogswell* (3 L. D., 23–27); *Whitaker* vs. *Southern Pacific R. R. Co.* (2 C. L. L., 919).

Much reliance is placed by counsel for plaintiff in error in his argument on this question on section 2262 of the Revised Statutes, which for the sake of clearness we give in full.

> SEC. 2262. Before any person claiming the benefit of this chapter is allowed to enter lands, he shall make oath before the register or receiver of the land district in which the land is situated that he has never had the benefit of any right of preëmption under section 2259; that he is not the owner of 320 acres of land in any State or Territory; that he has not settled upon and improved such lands to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not directly or indirectly made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself;

> and, if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same; and any grant or conveyance which he may have made, *except in the hands of bona fide purchasers, for a valuable consideration,* shall be null and void, except as provided in section 2288. And it shall be the duty of the officer administering such oath to file a certificate thereof in the public land office of such district, and to transmit a duplicate copy to the General Land Office, either of which shall be good and sufficient evidence that such oath was administered according to the law.

This, it is said, gives the owner of the certificate of purchase who buys it for value from the entryman without notice of its defects a good title against the Government. This clause does not purport to confer on a bona fide purchaser for value any rights which he would not have without the above italicized provision. It only saves him from the annulling effect of fraud in procuring the right and title to the land. If one has only purchased an equitable title, as is the case when he buys a certificate, he is not, as that term is understood in law, a bona fide purchaser for value. It is only when one has the legal title that he can occupy that position. It is not to be supposed that Congress used the term in any other than its usual legal sense. The proper meaning to be given to this clause is, therefore, that any grant or conveyance of the patent or legal title which the preëmptor may have made except in the hands of bona fide purchasers for a valuable consideration, shall be null and void. The exception was inserted merely to give to the patent the ordinary incident of a legal title.

Otherwise the strong language of the section might annul a patented title even in the hands of a bona fide purchaser.

This language in regard to bona fide purchasers has been paraphrased in *Meyers* vs. *Croft* (13 Wallace, 296), as follows:

> And any grant or conveyance made by him *before* the entry was declared null and void, with an exception in favor of bona fide purchasers for a valuable consideration.

This construction would make the language with reference to bona fide purchasers apply to any grant or conveyance made by the preëmptor before he secured the certificate of purchase, and so would give it no application to grants or conveyances made by him after the entry and the issuance of the certificate.

While this paraphrase completely destroys the argument of counsel for the plaintiff based on the clause, it is submitted that the construction thus suggested is hardly as satisfactory as that which makes the words "bona fide purchaser" apply to the purchaser of the patent or legal title. From the paraphrase in *Myers* vs. *Croft*, the inference is that grants and conveyances by the preëmptor before he makes his entry in the hands of a bona fide purchaser are not to be null or void for perjury in his proof. But section 2263 forbids any such grant or conveyance, and as he has neither equitable nor legal title before entry, how could he convey anything to anyone so as to make that person a bona fide purchaser?

The derivation of this section 2262 may throw some light upon its meaning and proper construction. The section is the same as section 13 of the act of 1841

(5 Stat., 453), and this was obviously framed and derived from a clause in the act of June 22, 1838 (5 Stat., 252), which reads as follows:

> That before any person claiming the benefit of this law shall have a patent for the land which he may claim by having complied with its provisions he shall make oath before some person authorized by law to administer the same, which oath, with the certificate of the person administering it, shall be filed with the register of the proper land office when the land is applied for, and by said register sent to the office of the Commissioner of Public Lands, that he entered upon the land which he claims, in his own right, and exclusively for his own use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatever, by which the title which he might acquire from the Government of the United States should inure to the use or benefit of any one except himself, or to convey or transfer the said land, or the title which he may acquire to the same, to any person or persons whatever, at any subsequent time; and if such person, claiming the benefit of this law as aforesaid, shall swear falsely in the premises, he shall be subject to all the pains and penalties for perjury, forfeit the money which he may have paid for the land, and all right and title to the said land, and any grant or conveyance which he may have made in pursuance of such agreement or contract as aforesaid shall be void, except in the hands of a purchaser in good faith, for a valuable consideration, without notice.

The bona fide purchaser here referred to is evidently the purchaser of the legal or patented title which the preëmptor had contracted to convey before making his

proof in violation of the section. The language of section 2262 is not so materially changed as to require a different construction. It is respectfully submitted that this removes the meaning of the clause from doubt.

But whether this suggestion makes the clause of section 2262 clear or not, the clause certainly can not be construed to have the effect of making the holder of what is conceded to be only an equitable interest a bona fide purchaser for value with rights superior to those of the United States, the owner of a prior equity and the holder of the legal title as well.

SUBSEQUENT ACTION OF THE LAND DEPARTMENT.

We have thus considered the two questions presented on the record. Counsel for the plaintiff in error has thought it proper to introduce into his brief certain letters purporting to be written by the Land Commissioner with reference to the entries herein. We confess ourselves unable to see how they can affect the case under discussion. They are not in the record; they are not presented in the question certified by the lower court, and they are not records of which this court can take judicial notice. We do not think it proper, therefore, to discuss their effect.

WM. H. TAFT,
Solicitor-General.